UNIVERSITY OF TORONTO
FACULTY OF LAW

FAMILY LAW

Cases and Materials

Volume II

Brenda Cossman &Carol Rogerson
Faculty of Law
University of Toronto

2013-2014

* * *

These materials are distributed solely for classroom use by students in the Faculty of Law, University of Toronto

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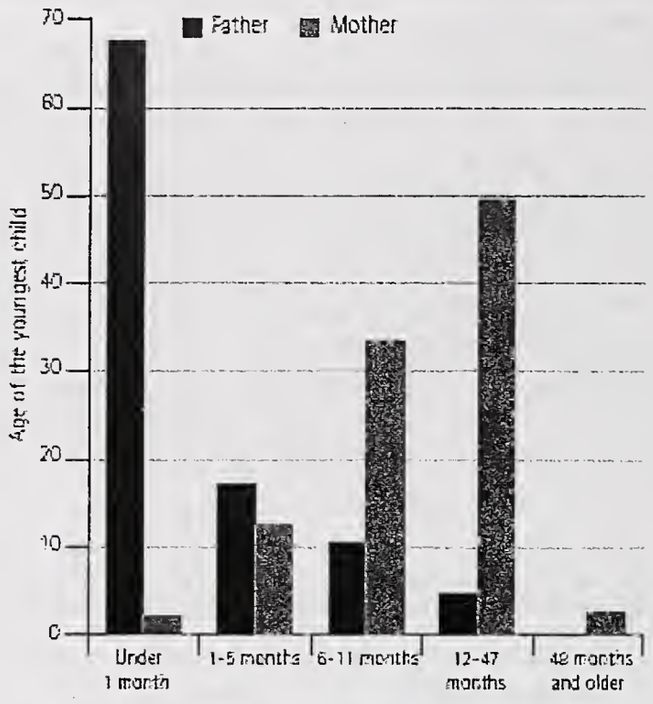

Source: Beaupré and Cloutier (2007, chart 4).

B. The Economic Consequences of Divorce

Note: The Economic Consequences of Divorce

In her book *The Divorce Revolution* (New York: Free Press, 1985) Lenore Weitzman documented a dramatic decline in the economic circumstances of women and children after divorce:

> This research shows that, on the average, divorced women and the minor children in their households experience a 73 per cent decline in their standard of living in the first year after divorce. Their former husbands, in contrast, experience a 42 per cent rise in their standard of living.

It subsequently came to light that Weitzman's research was flawed and that the gender-gap in post-divorce standards of living in her sample was not as extreme as she had reported. Replications of her analysis produced estimates of a 27 percent decline in women's standard of living (rather than 73 percent) and a 10 percent increase in men's standard of living (rather than 42 percent): see Richard Peterson, "A Re-evaluation of the Economic Consequences of Divorce" (1996), 61 *Am. Soc. Rev.* 528. In her reply to Peterson [at 537 of the same issue of the *Am. Soc. Rev.*] Weitzman acknowledges the errors in her research but states:

> ...I urge that we not lose sight of the major finding of *The Divorce Revolution*—and of all other research in this area—that women and children are unfairly and disproportionately burdened by divorce. While it is likely ...that the gender gap is less than I reported, even if the post-divorce standards of living, as Peterson contends, drop an average of *only* about 30 percent for women, and rise *only*

> about 10 percent for men, *that is still a 40 percent difference between the two—and that outcome is unconscionable for a legal system and a society committed to fairness, justice, and equality.*

Studies from the 1990s confirmed that the economic consequences of divorce in Canada conform to the general patterns found in the United States, Australia and Britain, *i.e.*, significant gender disparities in post-divorce standards of living and in rates of impoverishment. A 1990 study by the federal Department of Justice, based on interviews with 599 divorced or divorcing persons in four different sites, found that women's average income following divorce, including support, was 69 percent of men's income, after paying support. Some 46 percent of women had incomes below the poverty line, in contrast to only 13 percent of men. Using a larger sample of approximately 1500 court files in divorce cases, the Department of Justice study found that, taking support payments into account, two-thirds of the women had incomes that put them below the poverty line. See Department of Justice, Canada, *Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation*, May 1990.

Ross Finnie, using data based on Canadian tax files—the Longitudinal Administrative Database (LAD)—found that both men and women experienced a decline in family income after divorce. Men's family income dropped on average by 20 percent while women's dropped by 40 percent in the first year of divorce. However, in terms of economic well-being, measured by income-to-needs ratios which take into account the number of persons in a household, he found sharp divergences between men and women. Men experienced modest improvements in economic well-being (20 percent on average) while women experienced a 30 percent decline. Finnie found an overall post-divorce poverty rate of 17 percent for men and 43 percent for women. See Ross Finnie, *"Women, Men and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data"* (1993), 30 *Can. Rev. Soc. and Anthr.* 204.

Have the economic consequences of divorce changed since 1993 as a result of significant law reform efforts, increased government benefits for low income families with children and increased rates of labour force participation for women? The materials that follow suggest that the answer is both yes and no.

Robert Leckey, "Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past"

Institute for Research on Public Policy, *Choices*, Vol. 15 (8), July 2009, at 7-9, 30 (footnotes omitted), available on-line at **http://www.irpp.org/indexe.htm**

From one household to two

After Parliament enacted a divorce law in the 1960s, the divorce rate increased significantly...

Divorce produces effects of many kinds for spouses, children and extended family members. Its chief legal effect, one with instrumental and symbolic resonance, is the change in the marital status of the spouses. Its chief economic effect is the division of property and income between two households. Divorcing spouses may take into account a wide range of rules, including religious precepts, economic imperatives, social rules and state laws. Whether it is negotiated or, failing agreement, decided by a judge, a divorce settlement often draws on two bodies of legal rules: provincial legislation on the division of matrimonial property and federal divorce legislation on spousal support, child support and child custody.

...

... [D]espite the concern for equality in the distributive rules of family law, recently divorced or separated mothers remain financially worse off than recently divorced or separated fathers. As

take a loss in this situation, but rather that the spouse who produced sufficient additional income to allow the other to acquire property must take any loss at all.

If both spouses work and contribute to the purchase of property, other rules come into play that tend to make the determination of ownership somewhat fairer. Generally speaking, if each spouse contributes money to the purchase of an asset, each will have a share, either in proportion to the amount of money he or she put up, or, where the court finds the spouses intended to share equally, an equal share. In many cases where equal sharing has been ordered by a court, the evidence of intention to share equally is highly equivocal, since most married people tend to operate on the basis of unspoken understandings rather than formal arrangements made at the time property is purchased. There is a recent trend in modern Canadian law for the courts to find that married persons intended equal sharing once some financial contribution by both spouses to the purchase of property is proved, regardless of the inequality of the contributions. The courts say "equity is equality". In our view, this tendency towards equality represents an attempt by the courts to compensate for the inability of the traditional law of separate property to produce fair results in situations where a wife's time has been mainly taken up by caring for children and household management, with only temporary periods of employment.

In order to have any sharing, however, there must always be a direct financial contribution by both spouses to the acquisition of the property. No doctrine exists that the value of a contribution towards the family home, farm or business by way of management, physical labour, cooking, housekeeping, or child care is sufficient to give a spouse making such a contribution—and these are almost invariably wives—any share in the business, farm, home or property.

It is, of course, always possible for one spouse to make a gift of property to the other. This is the way in which a non-earning wife gets any claim to assets purchased out of her husband's income, and is the one area in which the law of separate property has recognized and to some degree compensated for the propertyless position of the dependent wife. If a husband buys property out of his earnings and takes the title in the joint names of himself and his wife, he is presumed in law to have intended to make a gift to her of one-half of the value of the property. Similarly, if he buys property in her name, the law presumes that he has made a gift of the entire property to her. This is called the "presumption of advancement" and applies only in one direction: if a wife buys property from her earnings and takes the title in joint names or in her husband's name alone, the presumption is that she retains the full interest, and that he holds the property, or a share in it, as a trustee for her. This is the presumption of "resulting trust". Both presumptions can be rebutted by evidence showing that the intention of the purchaser was different from what is presumed, but in the absence of such evidence wives take property purchased by their husbands under these conditions as gifts, while they retain the full beneficial interest in property that they have purchased and placed in their husband's names.

Note: *Murdoch v. Murdoch* and *Rathwell v. Rathwell*

In *Murdoch v. Murdoch* [1975] 1 S.C.R. 423, (1973), 41 D.L.R. (3d) 367, the parties were married in 1943 and separated in 1968. From 1943 to 1947, the couple worked on various ranches, hiring themselves out as a couple, the husband breaking horses and looking after cattle, and the wife cooking for the work crews and assisting in her husband's duties. They were paid $100 per month, which was received by the husband. In 1947, the husband bought a ranch, which the couple operated until it was sold in 1951. They then rented and operated a farm, and in 1958, the husband bought a new farm, which was the property in issue. During the period 1947 to 1968, the husband worked away from home for five months of each year for a stock association, and during these periods, the wife performed the work which was involved in operating the farms. Her work included "haying, raking, swathing, moving, driving trucks and tractors and

teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding anything that was to be done".

On separation, the wife commenced an action claiming (among other things) financial support and a declaration that her husband was trustee for her of an undivided one half interest in the property owned by him and in relation to which she claimed they were "equal partners." At trial, the judge concluded that there was no evidence of partnership and denied her claim to share in the property. He awarded her $200 per month by way of support. The Alberta Court of Appeal dismissed her appeal.

On appeal to the Supreme Court of Canada, Martland J. for the majority held that since the trial judge had found that there had been no direct financial contribution to the acquisition of the property by the wife, there was no basis for finding a resulting trust in her favour. With respect to the wife's work in connection with the farming activities, Martland J. accepted the view of the trial judge that the work Mrs. Murdoch had done while living with her husband was merely "the work done by any ranch wife". He thus concluded that her work could not give her any beneficial interest in the property claimed by way of a resulting trust, unless there was a common intention between the spouses to that effect. He held that no such common intention existed (despite the fact that the husband had stated, on his examination in chief, that "I thought we was going to go along as a team" when questioned about his intention with regard to ownership on purchasing the property).

Laskin J., in dissent, disagreed with the trial judge's finding that the wife had not made a financial contribution to the various purchases of property taken in her husband's name, pointing out, among other things, that part of the money used was received by the husband for his wife's work as a cook. He went on to assert that the contribution of labour, which facilitated the acquisition of progressively larger properties, should not be treated as any less significant than her direct financial contribution. Laskin J. argued that "the appropriate mechanism to give relief to a wife who cannot prove a common intention or to a wife whose contribution to the acquisition of property is physical labour rather than purchase money is the constructive trust which does not depend on evidence of intention" (p. 388). He held that the basis of the constructive trust is unjust enrichment, and that where property has been acquired in such circumstances that the holder of the legal title cannot in good conscience retain the beneficial interest, equity converts that person into a trustee of that interest. On the basis of the wife's financial and physical contributions, Laskin J. held that there was a constructive trust in a portion of the property in her favour.

Ironically, it was the majority judgment which provided the catalyst for law reform in relation to property rights for women at marriage breakdown, in particular the judicial comments negating the significance of Mrs. Murdoch's contributions of farm labour. Most commentators on this case began suggesting the need for immediate legislative action. An editorial in the Toronto Star, for example, suggested that the decision was both "a warning to women and a cue to legislators"; the article cited the recommendation of the 1970 Royal Commission on the Status of Women in Canada that the law should be amended to recognize "the concept of equal partnership in marriage" and supported law reform efforts to prevent other "Irene Murdochs [from being] left out in the cold with less than $60 a week to show for a quarter-century of labor."

The law reform process at both the federal and provincial levels also reflected public reaction to the outcome of the *Murdoch* decision. The federal report, issued in 1975, stated pointedly:

> The need for some fundamental reorganization of the existing property laws ... regulating the rights of obligations of family members was underlined in the recent decision of the Supreme Court of Canada in *Murdoch v. Murdoch*. The public reaction to that decision clearly indicates that the existing laws discriminate to the prejudice of the married woman and are no longer acceptable in contemporary society. A property regime must be devised that will promote equality of the sexes before the law.

Thus, both public opinion and law reformers were in agreement about the need for reform after *Murdoch*, and, turning away from the courts which seemed to hold so little promise for appropriate decision-making in this area, they focused attention on legislative reform. A number of statutes reforming family law were enacted in Ontario in the years after the *Murdoch* decision, culminating in a broad reform statute in 1978, the *Family Law Reform Act*, which will be discussed further in the next section of the materials.

Ironically, in the same year, the Supreme Court of Canada decided *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 1 R.F.L. (2d) 1, a decision which recognized the appropriateness of the constructive trust doctrine in the divorce context. In this case, a wife claimed a half interest in all lands held by her husband under the doctrines of resulting trust and constructive trust. The parties were married in 1944 and separated in 1967. During the marriage, three purchases of land were made. For each purchase, money from a joint bank account was used to provide the initial payment, with the balance of the price being met through crop share payments. Title to all of these lands was issued in the husband's name. There was no discussion between the husband and the wife concerning beneficial ownership of the land, apart from a statement by him from time to time that the lands were "ours". In addition to raising and educating four children, the wife made extensive contributions to the farming business. She did the chores when the husband was busy on the land; looked after the garden and canned the produce; milked cows and sold the cream; drove machinery; bailed hay; provided meals and transportation for hired help, and kept books and records of the farming operation. Often while the husband worked in the fields, she fulfilled his obligations under a contract to drive a school bus. At trial, the husband acknowledged that the parties were engaged in a "joint effort" and "working together as a husband and wife in the farming business".

The wife's claim was rejected at trial. The Saskatchewan Court of Appeal reversed the trial judge's decision, awarding the wife an undivided one-half interest in the lands purchased prior to separation. The husband appealed to the Supreme Court of Canada. The Supreme Court dismissed the appeal. However, the majority of the Court did not use the doctrine of constructive trust in awarding the wife an interest in the land, employing instead the doctrine of resulting trust.

Dickson J. (as he then was and with whom Laskin C.J.C. and Spence J. concurred) held that the wife's claim succeeded on either the doctrine of resulting trust or the doctrine of constructive trust. The presumption of common intention from her contribution in money and money's worth entitled her to succeed in resulting trust, and her husband's unjust enrichment entitled her to succeed in constructive trust. Dickson J. drew a distinction between a resulting trust and a constructive trust. With respect to a resulting trust, courts look for a common intention manifested by acts or words that property is acquired as a trustee. He noted, however, that there is seldom express or implied common intention in respect of property division, apart from the general intention of building a life together. Where a common intention cannot be presumed, the doctrine of resulting trust cannot apply and courts must turn to the doctrine of constructive trust:

> The constructive trust encompasses a more uncertain amplitude than the resulting trust.... Where a common intention is clearly lacking and cannot be presumed, but a spouse does contribute to

> family life, the court has the difficult task of deciding whether there is any casual [sic] connection between the contribution and the disputed asset. It has to assess whether the contribution was such as enabled the spouse with title to acquire the asset in dispute. That will be a question of fact to be found in the circumstances of the particular case. If the answer is affirmative, then the spouse with title becomes accountable as a constructive trustee. The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions. The relief is part of the equitable jurisdiction of the court and does not depend on evidence of intention....
>
> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the courts in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment.
>
> The emergence of the constructive trust in matrimonial property disputes reflects a diminishing preoccupation with the formalities of real property law and individual property rights and the substitution of an attitude more in keeping with the realities of contemporary family life. The manner in which title is registered may, or may not, be of significance in determining beneficial ownership....

Dickson J. set out three principles which limit a court's discretion. First, a court should accept any agreement made by a husband and wife with respect to the sharing of property. Second, the mere fact of marriage does not create "family property" that will be shared: "The mere fact of marriage does not bring any pre-nuptial property into community ownership, or give the courts a discretion to apportion it on marital breakdown." Third, not every contribution which will entitle a spouse to a one-half interest in the matrimonial property. "The extent of the interest will be proportionate to the contribution, direct or indirect, of the spouse. Where the contributions are unequal, the shares will be unequal. A spouse who fails to make a contribution has no claim in justice to assets acquired wholly by the efforts of the other spouse."

Ritchie J. (Pigeon J. concurring) found "a resulting trust in favour of the wife stemming from the intention of the parties evidenced by her original contribution." He found it unnecessary to consider constructive trust or unjust enrichment.

Martland J. (with whom Judson, Beetz, and de Grandpré JJ. concurred) dissented. He agreed with the majority that on the facts the wife was entitled to some interest, but did not agree that this should be an equal interest. He stated that prior decisions of the Court, including *Murdoch*, stood in the way of the application of a doctrine of constructive trust as a means of preventing unjust enrichment, and that as a matter of public policy any extension beyond the scope of existing law should be determined by legislation.

In the face of widespread enthusiasm for the new statutory reforms providing for the division of matrimonial property between spouses upon marriage breakdown, the availability of the constructive trust as recognized in *Rathwell* was not regarded as generally significant for married couples. However, trust doctrines, and in particular the doctrine of constructive trust, have continued to be relevant to the resolution of property disputes between unmarried cohabitants (in both opposite-sex and same-sex relationships), who are not covered by the statutory matrimonial property regimes (with the exception of Saskatchewan and Manitoba and even that is only very recent). As the following cases show, the doctrine of constructive trust, under the direction of the Supreme Court of Canada, has continued to evolve in response to changing social perceptions of the nature of the spousal relationship and the value of domestic labour.

As well, as will be explored in the materials on the *Family Law Act*, below, issues have arisen about the continued availability of trust doctrines in the context of property division between married couples and the interaction between the common law and statutory remedies: see *Rawluk v. Rawluk* (1990), 23 R.F.L. (3d) 337 (S.C.C.).

Pettkus v. Becker

[1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165

DICKSON J. (LASKIN C.J.C., ESTEY, MCINTYRE, CHOUINARD, and LAMER JJ. concurring):—The appellant Lothar Pettkus, through toil and thrift, developed over the years a successful bee-keeping business. He now owns two rural Ontario properties, where the business is conducted, and he has the proceeds from the sale, in 1974, of a third property located in the province of Quebec. It is not to his efforts alone, however, that success can be attributed. The respondent Rosa Becker, through her labour and earnings, contributed substantially to the good fortune of the common enterprise. She lived with Mr. Pettkus from 1955 to 1974, save for a separation in 1972. They were never married. When the relationship sundered in late 1974 Miss Becker commenced this action, in which she sought a declaration of entitlement to a one-half interest in the lands and a share in the bee-keeping business.

I. The facts

Mr. Pettkus and Miss Becker came to Canada from central Europe separately, as immigrants, in 1954. He had $17 upon arrival. They met in Montreal in 1955. Shortly thereafter, Mr. Pettkus moved in with Miss Becker, on her invitation. She was 30 years old and he was 25. He was earning $75 per week; she was earning $25 - $28 per week, later increased to $67 per week.

A short time after they began living together, Miss Becker expressed the desire that they be married. Mr. Pettkus replied that he might consider marriage after they knew each other better. Thereafter, the question of marriage was not raised, though within a few years Mr. Pettkus began to introduce Miss Becker as his wife and to claim her as such for income tax purposes.

From 1955 to 1960 both parties worked for others. Mr. Pettkus supplemented his income by repairing and restoring motor vehicles. Throughout the period Miss Becker paid the rent. She bought the food and clothing and looked after other living expenses. This enabled Mr. Pettkus to save his entire income, which he regularly deposited in a bank account in his name. There was no agreement at any time to share either moneys or property placed in his name. The parties lived frugally. Due to their husbandry and parsimonious life-style, $12,000 had been saved by 1960 and deposited in Mr. Pettkus' bank account.

The two travelled to western Canada in June 1960. Expenses were shared. One of the reasons for the trip was to locate a suitable farm at which to start a bee-keeping business. They spent some time working at a bee-keeper's farm.

They returned to Montreal, however, in the early autumn of 1960. Miss Becker continued to pay the apartment rent out of her income until October 1960. From then until May 1961 Mr. Pettkus paid rent and household expenses, Miss Becker being jobless. In April 1961 she fell sick and required hospitalization.

In April 1961 they decided to buy a farm at Franklin Centre, Quebec, for $5,000. The purchase money came out of the bank account of Mr. Pettkus. Title was taken in his name. The floor and roof of the farmhouse were in need of repair. Miss Becker used her money to purchase flooring materials and she assisted in laying the floor and installing a bathroom.

For about six months during 1961 Miss Becker received unemployment insurance cheques, the proceeds of which were used to defray household expenses. Through two successive winters she lived in Montreal and earned approximately $100 per month as a baby-sitter. These earnings also went toward household expenses.

She and Lothar Pettkus had put years of work into developing a small beekeeping farm at Franklin Centre, Que., 120 kilometres (75 miles) east of Ottawa.

Becker never collected a cent. Although the farm was sold and she was to have netted $68,000, her lawyer, Gerald Langlois, claimed the money to cover his fees.

Becker committed suicide in 1986, leaving a note saying her death was a protest against a legal system that had left her penniless.

Trustees for the Becker estate agreed to the $13,000 settlement from Pettkus, said Samuel Schwisberg, lawyer for Pettkus.

Becker named as beneficiaries Fred and Joyce Schwalb and Louis Flexie, who were among her friends.

How much of the $13,000 would actually get to her beneficiaries was not clear.

Note: *Sorochan v. Sorochan*

In *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 2 R.F.L.(3d) 225, the Supreme Court of Canada held that the doctrine of constructive trust can apply to assets acquired before a relationship began. The parties in this case lived together for 42 years, between 1940 and 1982, on a farm in Alberta. During that time, they jointly worked a farming operation and had six children. The parties never married. In addition to performing all of the domestic labour associated with running the household and caring for the children, the wife worked long hours on the farm, for which she received no remuneration from the husband. The family lived in modest circumstances. At the time the parties began living together, the husband was the owner of the land, along with his brother. Subsequently, the land was divided between the two brothers. From 1942 to 1945, and from 1968 to 1982, the husband worked as a travelling salesperson. During these periods, the wife often assumed responsibility for doing all of the farm chores on her own. Following their separation in 1982, the wife brought an action for an interest in the farmland owned by the husband.

The trial judge found that the doctrine of constructive trust was available in these circumstances and awarded the wife title to one-third of the farm property by way of constructive trust and monetary relief of $20,000. The Alberta Court of Appeal reversed the trial judge's ruling, holding that no constructive trust had been created because there was no link between the husband's acquisition of the property in question and the wife's labour. The Supreme Court of Canada allowed the wife's appeal and restored the trial judge's award.

Dickson C.J.C., speaking for the Court, found that the three requirements necessary to the finding of unjust enrichment, outlined in *Pettkus v. Becker* and *Rathwell v. Rathwell*, were present in this case. The Court found that the husband was enriched through the wife's many years of labour in the home and on the farm and for which he did not provide remuneration. In addition, through the wife's labour, the farm was maintained and preserved as valuable farm land. Dickson C.J.C. noted that the farm would have deteriorated in value through neglect or disuse in the absence of the wife's faithful and long years of labour. He found that these years of labour constituted the wife's corresponding deprivation. Finally, Dickson C.J.C. found that there was no juristic reason for the enrichment. The wife was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land. The wife had prejudiced herself with the reasonable expectation of receiving something in return and the husband had freely accepted the benefits conferred by the wife in circumstances where he knew or ought to have known of that reasonable expectation. In particular, in 1971 the wife had asked the husband to transfer land into her name.

Having concluded that the three pre-conditions for unjust enrichment were satisfied in this case, Dickson C.J.C. then considered whether it was appropriate for a court to impose a constructive trust:

> [T]he first issue to be considered is the causal connection requirement, upon which the Court of Appeal's decision turned....In my view, the constructive trust remedy should not be confined to cases involving property acquisition. While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice. What remains primary is whether or not the services rendered have a "clear proprietary relationship"....When such a connection is present, proprietary relief may be appropriate. Such an approach will help to ensure equitable and fair relief in the myriad of familial circumstances and situations where unjust enrichment occurs. As stated in *Pettkus*..."The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs."
>
> In the present case, Mary Sorochan worked on the farm for 42 years. Her labour directly and substantially contributed to the maintenance and preservation of the farm preventing asset deterioration or divestment. There is, therefore, a 'clear link' between the contribution and the disputed assets.

Dickson C.J.C. then added other considerations to be taken into account in assessing whether to impose a constructive trust:

> In addition to the causal connection requirement, it is often suggested that the reasonable expectation of the claimant in obtaining an actual interest in the property as opposed to monetary relief, constitutes another important consideration in determining if the constructive trust remedy is appropriate....A reasonable expectation of benefit is part and parcel of the third pre-condition of unjust enrichment (the absence of a juristic reason for the enrichment). At this point, however, in assessing whether a constructive trust remedy is appropriate, we must direct our minds to the specific question of whether the claimant reasonably expected to receive an actual interest in property and whether the respondent was or reasonably ought to have been cognizant of that expectation. As concluded above, Mary Sorochan did have a reasonable expectation in obtaining an interest in the land and Alex Sorochan was aware of her expectation in this regard.
>
> In assessing whether or not an *in rem* remedy is appropriate, a final consideration in this case is the longevity of the relationship. The appellant worked the farm for 42 years of her life. In my opinion, this constitutes a further compelling factor in favour of granting proprietary relief.

Peter v. Beblow

[1993] 1 S.C.R. 980, 44 R.F.L. (3d) 329

[This case is most notable because of the clear confirmation that contributions of domestic services can give rise to a claim in unjust enrichment. The majority reasons in this case were written by McLachlin J. The reasons of Cory J., which appear first, support the result reached by McLachlin J., but his analysis of the doctrine of constructive trust differs from hers, most notably with respect to the remedial issue. The issue of how to read the majority reasons of McLachlin J. with respect to determining the appropriate remedy—monetary or proprietary—once unjust enrichment has been found continued to give rise to confusion and disagreement in the case law until 2011, when the SCC attempted to clarify the issue in *Kerr v. Barranow,* found below.]

CORY J. (L'HEUREUX-DUBÉ and GONTHIER JJ. concurring):—The issue in this appeal is whether the provision of domestic services during 12 years of cohabitation in a common law relationship is sufficient to establish the proprietary link which is required before the remedy of constructive trust can be applied to redress the unjust enrichment of one of the partners in the

while they were living at the house and maintenance of the property. The testimony of the plaintiff's son provides a general idea of her contribution to the family enterprise:

> Q. What sort of things did she do?
> A. She did all the motherly duties for all of us....
> A. When [the defendant's] two sons and my brother and I were there still, even when my sisters were there, that was quite a long time ago, I was quite young, so there was nothing really bad then, but after the sisters left, she took care of all the duties, cooking and stuff like that, cleaning, laundry. She had her ringer washer, she would do the laundry, she'd worked in the garden, things like that. She took care of all things around the house, when he was gone especially....
> Q. Do you remember what work your mother did in the yard outside?
> A. M'hm, they both got together doing the garden, he would do the roto-tilling, they would both take care of the planting and stuff; when he was gone, she would do all the weeding and keeping up. They would share the watering of the garden. She put together three or four flower gardens all herself, except for the hard heavy work, like lifting rocks, when she first started, that was shared by all of us, including the kids.

Of all the chores performed around the property, the son states that the various siblings had minor chores, such as chopping wood and making beds. "Everything else, the major stuff, she would take care of." Other evidence, including testimony from Catherine Peter and William Beblow, supports this picture of the appellant's contribution. The trial judge held that while the respondent worked in the construction business:

> ...he would be away from home during the week and would return on the weekend whenever possible. While he was absent, the Plaintiff would care for the property in the home and care for the children while he was away...
>
> In effect, the Plaintiff by moving into the Respondent's home became his housekeeper on a full-time basis without remuneration except for the food and shelter that she and the children received until the children left home.

The respondent also contributed to the value of the family enterprise surviving at the time of breakup; he generated most of the family income and helped with the maintenance of the property.

Clearly, the appellant's contribution—the "value received" by the respondent—was considerable. But what then of the "value surviving"? It seems clear that the maintenance of the family enterprise through work in cooking, cleaning, and landscaping helped preserve the property and saved the respondent large sums of money, which he was able to use to pay off his mortgage and to purchase a houseboat and a van. The appellant, for her part, had purchased a lot with her outside earnings. All these assets may be viewed as assets of the family enterprise to which the appellant contributed substantially.

The question is whether, taking the parties' respective contributions to the family assets and the value of the assets into account, the trial judge erred in awarding the appellant a full interest in the house. In my view, the evidence is capable of supporting the conclusion that the house reflects a fair approximation of the value of the appellant's efforts as reflected in the family assets. Accordingly, I would not disturb the award.

Appeal allowed.

Note: Constructive Trust Post *Peter v. Beblow*

Shortly after the *Peter v. Beblow* decision many courts (especially in British Columbia, but also to some degree in Ontario) began to show a greater willingness to award constructive trusts upon termination of common law relationships. They began to eschew measuring the respective contributions of the parties with precision, and did not reject constructive trust claims simply because the untitled spouse received some benefit during the relationship. Instead, courts approximated the respective contributions

and determined the property interest on that basis. Although the untitled spouse did not always receive a 50% interest in the property in issue, a pattern of fairly generous awards was developing.

However, over the course of the last decade significant tensions appeared in the law of constructive trust. Courts split over the way to measure the respective contributions of the parties to the relationship in determining whether or not there has been unjust enrichment and over the appropriate remedy if unjust enrichment has been found. Some of this tension focussed on the choice between the "value received" and "value survived" methods of measuring the parties' contributions which in turn was complicated by on-going confusion since *Peter v. Beblow* about the way in which these different ways of measuring contributions relate to a monetary or proprietary remedy.

The Supreme Court of Canada's ruling in *Nova Scotia (Attorney General) v. Walsh*, [2002] 2 S.C.R. 325, 32 R.F.L. (5th) 81 (sub nom *Walsh v. Bona)* found in volume I of these materials, that it is not discriminatory under s. 15 of the Charter to exclude of unmarried couples from schemes of matrimonial property legislation, also had some impact on the evolution of the law of constructive trust. Some cases suggested that the "choice" arguments so strongly endorsed in *Walsh* were responsible for the evolution of constructive trust doctrine in a more restrictive direction.

In February of 2011 the Supreme Court of Canada issued another major decision on the use of trust doctrines in the domestic context. In the *Kerr v. Baranow* decision, found below, the Court attempted to answer some of the questions that continued to surround the constructive trust and took the opportunity, as well, to clarify the role of the common intention resulting trust.

Kerr v. Baranow

2011 SCC 10, [2011] 1SCR 269, 328 DLR (4th) 577, 93 RFL (6th) 1

The judgment of the Court was delivered by CROMWELL J. (McLachlin C.J. and Binnie, LeBel, Abella, Charron, and Rothstein JJ. concurring)

I. Introduction

[1] In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic relationship. Now, for married spouses, comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

[2] In the early cases of the 1970s, the parties and the courts turned to the resulting trust. The underlying legal principle was that contributions to the acquisition of a property, which were not reflected in the legal title, could nonetheless give rise to a property interest. Added to this underlying notion was the idea that a resulting trust could arise based on the "common intention" of the parties that the non-owner partner was intended to have an interest. The resulting trust soon proved to be an unsatisfactory legal solution for many domestic property disputes, but claims continue to be advanced and decided on that basis.

[3] As the doctrinal problems and practical limitations of the resulting trust became clearer, parties and courts turned increasingly to the emerging law of unjust enrichment. As the law

[161] I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the trial judge. The appellant should have her costs throughout.

V. The *Kerr* Appeal

[In the case of the *Kerr* appeal, which involved very complicated facts combined with a serious misunderstanding of the facts on the part of the trial judge, the Court concluded that the appropriate remedy was to send the case back to the trial judge. The case involved claims of unjust enrichment by both Kerr and Baranow arising from their common law relationship of 25 years (Baranow's defense to Kerr's claim was a counterclaim for unjust enrichment on his part). The Court found that the record did not provide sufficient evidence to determine whether or not their relationship constituted a joint venture. This case, which raised the issue of whether unjust enrichment could be established, was contrasted with the *Vanasse* appeal, where unjust enrichment was conceded and the trial findings of fact closely corresponded to the joint family venture analytical approach proposed by the Court. The result of the re-hearing in *Kerr* is discussed below.]

Notes and Questions

1. Where does the concept of joint family venture come into the analysis? Does it only come in at the stage of determining the appropriate remedy, after there has been a finding of unjust enrichment, or does it come in at the very beginning of the unjust enrichment analysis because it shapes the way unjust enrichment is conceptualized (i.e. as based not on a contribution to a specific asset or on unpaid services but based on the accumulation of a pool of wealth as result of joint efforts); see paras. 59 and 60.

2. What role is left for the proprietary remedy of constructive trust in unjust enrichment claims between unmarried partners? Will a monetary remedy quantified on a value-survived basis become the typical remedy? When quantifying the monetary remedy, what date will be used for valuing the assets?

3. Does *Kerr v. Baranow* have implications for the legislative extension of matrimonial property rights to unmarried couples? Recall the different ways the constructive trust remedy was portrayed in *Walsh v. Bona* where the S.C.C. rejected the argument that the exclusion of unmarried couples from matrimonial property laws constituted discrimination under s. 15 of the Charter. Justice Bastarache saw the constructive trust as a fine-tuned remedy capable of generating an equitable result tailored to the facts of the case. Justice L'Heureux-Dubé, on the other hand, saw it as a highly uncertain, costly and inadequate remedy. Assuming that Justice L'Heureux-Dubé's comments captured to some degree the reality of the situation before *Kerr v. Baranow*, to what extent has *Kerr* eliminated those difficulties? Will *Kerr* give legislatures more justification for refusing to extend matrimonial property? Or does *Kerr* signal a shift in legal perceptions of the nature of common law relationships and of the fair redistribution of wealth in such relationships when they breakdown?

4. For an analysis both of the *Kerr* decision and of the subsequent applications of *Kerr* framework by lower courts see Berend Hovius, "Property Disputes Between Common-Law Partners: The Supreme Court of Canada' Decisions inn *Vanasse v. Seguin* and *Kerr v. Baranow*" 92011) 30 Can. J. Fam. Law 129.

5. The result of the rehearing in *Kerr v. Barranow* by the B.C. S.C. was released in 2012: see *Kerr v. Baranow*, 2012 BCSC 1222, 22 RFL (7th) 335), discussed in the note below.

NOTE: *Kerr v. Baranow* on Rehearing (*Kerr v. Baranow*, 2012 BCSC 1222, 22 RFL (7th) 335))

Kerr v Baranow was a complicated case factually. The parties lived together for 25 years. When they met in 1981, they were both 40 years old. Mr Baranow, who had never been married, had a net worth of approximately $72,000. He owned a house (the Wall St. property) which was valued at $55,000 with a mortgage of $16,000, and had additional savings of $33,000. At the beginning of their relationship they lived in the Wall St. property. Ms Kerr was a divorced mother of two teenaged children with no savings and debts of $15,000. (Two years later, in 1983 she declared bankruptcy.) Ms Kerr had received the equity in her former matrimonial home (the Coleman property) under her separation agreement, but was about to lose the property because of foreclosure proceedings by her former husband's creditors as she did not have the funds to redeem the property.

On her lawyer's advice Ms Kerr transferred the Coleman St. property to Mr. Baranow for a nominal consideration ($2), who would then used his funds to redeem it from forfeiture. (At that time the house was worth $170,000 with an equity of $40,000. Mr. Baranow invested his savings and took out a mortgage of $100,000). The couple then lived in the Coleman St. property for four years and Mr. Baranow rented out the Wall St. property. Eventually the Coleman St. property was sold (in a falling market--for $130,000). Meanwhile, the Wall St. house was totally rebuilt as their "dream home", with Mr. Baranow taking out an additional mortgage and infusing additional funds of approximately $100,000. Ms. Kerr assisted with the decoration of the property. The parties moved into that property in 1986 and lived there until the end of their relationship.

Both parties worked full time for the first ten years of the relationship, with Mr. Baranow earning approximately $50,000 - $60,000 per year as a longshoreman and Ms. Kerr earning approximately $30,000 as a secretary for the port authority. Ms. Kerr paid for most of the groceries, house insurance and the utilities, and did the bulk of the housework and cleaning while Mr. Baranow paid the mortgages and property taxes on both the Coleman and Wall St. properties. The parties kept separate bank accounts and paid their separate vehicle expenses. In 1991 Ms. Kerr suffered a massive stroke and cardiac arrest and was required to stop working. Her income remained relatively the same as received a disability pension, and thus she continued to pay for much of the food and utilities. However, over time her mobility became more and more limited and Mr. Baranow had to take over more and more of the household chores and her personal care (including driving her to all of her appointments). In 2002 Mr. Baranow took early retirement, in part to be able to provide additional care to Ms. Kerr. By 2006 he had started to experience care-taker fatigue; and after Ms. Kerr was hospitalized he indicated that he indicated that he was not prepared to take Ms. Kerr back into the Wall St. property. Ms. Kerr was placed in a four bed ward in an extended care facility. She was extremely resentful that she had been placed in a care home against her will and could not forgive Mr. Baranow. The relationship essentially ended then. Ms. Kerr wished to move to a bed in a private facility which would cost approximately $4000 -$5000 per month.

Ms. Kerr commenced proceedings against Mr. Baranow in 2007 seeking spousal support and claiming unjust enrichment and an interest by way of resulting trust in the Wall St. property. Mr. Baranow brought a counter-claim in unjust enrichment on the basis of the services he had provided to Ms. Kerr after her stroke. At the end of the relationship Mr. Baranow owned the house, which had appreciated in value significantly and was appraised at $960,000 (with no

mortgage), and had further assets (savings and RRSPs) of almost $800,000. Ms. Kerr had assets (savings and RRSPs) of approximately $270,000.Mr. Baranow's annual income was approximately $70,000 and Ms. Kerr's was $29,000.

The trial judge awarded Ms. Kerr a 1/3 interest in the Wall St. property by way of both resulting trust and unjust enrichment and significant spousal support ($1700 per month). The Court of Appeal set aside the rulings on trust, concluding that the trial judge had seriously misapprehended the evidence in concluding that Mr. Baranow had been enriched to the extent of the $40,000 initial equity in the Coleman St. property. On further appeal to the Supreme Court of Canada, the Court concluded, as noted above in its decision in *Kerr v. Baranow*, that the case should be sent back to the trial judge for a redetermination in light of the new framework the court had set out. The results of that re-hearing can be found in *Kerr v. Baranow*, 2012 BCSC 1222, 22 RFL (7^{th}) 335, portions of which are reproduced below.

Justice Gerow first dealt with Ms. Kerr's claim and concluded that Mr. Baranow was unjustly enriched by Ms. Kerr's contributions to the relationship:

> [30] The matter was sent back for a new trial to determine whether the claimant made other contributions which would establish a claim for unjust enrichment.
>
> [33] In my view, the claimant has established that she made a financial contribution to the acquisition of the Wall Street property. She paid for a number of the expenses, including the food, the house insurance and the utilities when the couple lived in the Coleman property from 1981 to 1985. Living in the Coleman property allowed the respondent to rent the Wall Street property and obtain some tax benefits. ...
>
> [36] It is apparent from a review of the financial information that the respondent could not have paid the amounts he did on the mortgages if the claimant had not paid for the bulk of the food and the household utilities. In my view, the claimant contributed to the acquisition of the Wall Street property as a result.
>
> [37] I accept the claimant's evidence that she also contributed through the construction period, both by cleaning on the construction site itself and by taking care of the bulk of the household duties and cooking, so that the respondent could deal with the management of the construction. ...
>
> [38] Since the claimant was paying for the food, the household utilities and the house insurance during the time they lived in the Coleman property, the respondent was able to use the bulk of his income to more quickly pay off the mortgages registered against the Coleman property and the Wall Street property. ...
>
> [41] As well, as stated earlier, the claimant did most of the cooking and cleaning of the house during that time, thereby freeing up the respondent to work more shifts in order pay the mortgages off more quickly.
>
> [42] ...[I]t is clear from the evidence that the respondent took on the majority of the household duties and assisted the claimant in a very significant manner after the claimant's stroke, especially as her mobility became more limited.
>
> [43] However, I find [nonetheless] that the claimant has satisfied the first and second steps of the unjust enrichment analysis. The respondent was enriched by the claimant in that he was able to both acquire extra income – from the rental of the Wall Street property and working extra shifts – and have his food and utilities paid for. As a result, he had more funds to put towards the mortgages on the Coleman property and the Wall Street property. As well, the claimant helped with the construction of the Wall Street property by cleaning the worksite at the end of the day, and helping with the decoration. The respondent agreed that until her stroke, the claimant did the majority of the cooking and the housecleaning.

[44] The claimant also contributed by providing furnishings, and buying some of the household items for the Wall Street property. The respondent had the benefit of claiming a disability tax exemption as a result of the claimant's disability for his municipal taxes for the Wall Street property.

[45] At the same time, the claimant suffered a corresponding deprivation. She did not use her income to purchase her own real estate or apply her housekeeping efforts or the time she spent helping during the construction solely to her own benefit.

There was found to be no juristic reason for the benefit and deprivation, hence Ms. Kerr had established unjust enrichment. It should be noted that the court did not deal with Mr.Baranow's counter-claim at this stage, but only at the remedy stage.

Moving onto the appropriate remedy, Gerow J. had no difficulty find that he parties were engaged in a joint family venture and therefor that a monetary award based on proportionate share of assets accumulated during the course of the relationship would be appropriate:

[66] The first issue is whether the parties engaged in a joint family venture. There can be no presumption of a joint family venture. At para. 89, Cromwell J. sets out four broad evidentiary headings to be considered in making this determination, namely: mutual effort; economic integration; actual intent; and priority of family. ...

Mutual Effort

[68] ... the evidence supports a finding that the parties worked as a team to build their lives together. They refinanced the Coleman property and Wall Street properties to take advantage of lower interest rates. As stated earlier, the claimant paid for the utilities, food and house insurance for the Coleman property during the time the respondent was paying off the mortgages registered against both properties. That allowed the respondent to use the bulk of his income to reduce the mortgages more quickly than he would otherwise have been able to do. As well, she did the majority of the shopping and cooking, which freed the respondent up to work more shifts to pay the mortgages off more quickly.

[69] The parties worked together to plan, build and maintain their Wall Street property. ... The claimant continued to be responsible for the utilities and the food after they moved into the Wall Street property, and the respondent paid off the mortgage on the Wall Street property. ...

Economic Integration

[70] The parties did not have joint bank accounts; however, they did have the power of attorney over each other's bank accounts from 1984 until 2006, when the claimant changed the power of attorney to her son. As well, the claimant acted as a guarantor for the mortgages on the Wall Street property and the Coleman property when the properties were refinanced to take advantage of a lower interest rate. As mentioned earlier, the respondent took advantage of tax savings resulting from the claimant's disability. While their finances were not integrated, there is evidence that they placed importance on each other's welfare by having joint powers of attorney, entering into joint mortgages, shared health and dental plans, and structured certain aspects of their tax identities as an integrated unit.

Actual Intent

[72] ...[I]t is clear from the evidence that both parties intended to build a dream house in which they could live out their lives together on the Wall Street property. They held themselves out as a couple, and shared dental and health plans. The length of their relationship spanned 25 years.

[73] In addition to the above, the evidence shows that from the beginning of their relationship, the parties intentionally were focused on reducing debt, paying down the mortgages and building a life together on the Wall Street property. Both parties worked

towards this common goal which is consistent with an actual intent to be involved in a joint family venture.

Priority of Family

[99] As I see it, giving priority to the family is not associated exclusively with the actions of the more financially dependent spouse. The spouse with the higher income may also make financial sacrifices (for example, foregoing a promotion for the benefit of family life), which may be indicative that the parties saw the relationship as a domestic and financial partnership. ...

[75] As stated earlier, the parties held themselves out as a couple. The claimant's two sons continued to live with the couple for a period of time at the Coleman property. One of her sons came and lived with them in the Wall Street property and paid rent to the respondent. The respondent lent money to one of the claimant's sons.

[76] They got along well together. They entertained and went on holidays together. The focus was on the two of them enjoying their lives together, even after the claimant's stroke. They went on a cruise and on a camping trip down the Oregon coast after her stroke for example.

Conclusion about joint family venture

[77] In my view a consideration of the four factors supports the view that the parties were involved in a joint family venture.

Is there a link between the claimant's contributions and the accumulation of wealth?

[78] As set out earlier, the arrangement the couple entered into, whereby the claimant would pay for the food and utilities, allowed the respondent to use the bulk of his income to reduce the mortgages taken out on both the Coleman property and the Wall Street property. When the Coleman property was sold, there was no mortgage owing. The respondent was able to take the net sales proceeds of $130,000 and use it to construct the new home on the Wall Street property.

[79] There was a concerted effort by both parties to work hard to be debt free. In my view, the evidence establishes that the claimant's contributions are linked to the accumulation of the parties' wealth. The claimant transferred the Coleman property to the respondent and the parties lived in the house, thereby allowing the respondent to collect rental income from the Wall Street property. Her contribution in paying the house insurance for the Coleman property, the food and the utilities allowed the respondent to use the bulk of his income to pay off the mortgage quickly.

[80] There is no doubt that the respondent worked very hard, including extra shifts in order to pay off the mortgage. However, the claimant's shouldering of the bulk of the cooking and cleaning freed up the respondent to spend more time working. Although the respondent contributed more monetarily than the claimant, the claimant worked hard and contributed to her ability. After her stroke, she continued to pay for the utilities and much of the food.

[81] I have concluded as a result that the claimant has shown that there was a joint family venture and there is a link between her contributions to it and the accumulation of assets, namely the Wall Street property.

Gerow J. then went on to deal with the issue of the benefits Mr. Baranow conferred on Ms. Kerr during the course of the relationship contributions to the relationship. Gerow J. ruled that the fact that the benefits were conferred out of love and without expectation of compensation did not mean that they could not give rise to a claim for unjust enrichment. However, given the reasonable expectations of the parties that they were involved in a life partnership Gerow J. concluded that it was just that Ms. Kerr be allowed to retain at least some of the benefits. Thus some but not all those benefits should be accounted for in reducing Ms. Kerr's claim. Gerow J.

refused to put a value on the services. The appropriate remedy was determined to be a monetary amount equivalent to 25% of the 2007 value of the Wall St. property (leaving Ms. Kerr with approximately 30% of the wealth accumulated during the course of the relationship):

> **Conclusion**
>
> [106] In my view, the facts demonstrate that both parties conferred benefits on the other, and both have established that they made contributions to the other to their own detriment. The evidence establishes that the parties entered into a joint family venture where they accumulated assets, namely the new home on the Wall Street property and their personal savings. At the same time, they kept their finances separate and any resolution should demonstrate that.
>
> [107] The claimant has established a link between the claimant's contributions and the construction of the new house on the Wall Street property. In my view, it would be unjust for the respondent to retain that entire asset given the claimant's contributions.
>
> [108] However, the respondent's very significant contributions to the claimant's welfare and care, particularly after the stroke, must also be taken into account and go to reduce the amount the claimant would otherwise be entitled to.
>
> [109] As Cromwell J. stated at para. 102:
>
> > ... While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.
>
> [110] Having considered all of the circumstances, and both the claims of the claimant and the respondent, I have concluded that the claimant is entitled to a monetary award to offset her contribution to the Wall Street property equivalent to 25% of its appraised value of $960,000, which was done prior to the 2007 trial. Accordingly, the claimant is entitled to $240,000. As well, I have concluded that both parties should retain the savings in their name.

The case that follows, *Nowell v. Town Estate*, involved a claim for unjust enrichment which arose in the context of a long-term affair where the parties had never cohabited. The decision of the trial judge, denying the claim, is followed by that of the Ontario Court of Appeal allowing it.

Nowell v. Town Estate

(1994), 5 R.F.L. (4th) 353 (Ont. Gen. Div.)

JARVIS J.:—

Introduction

This action is brought by Iris Nowell against the estate of the late Harold Barling Town for a declaration that the late Mr. Town was unjustly enriched as a result of the services Ms Nowell performed during their personal relationship. As a remedy, she seeks the imposition of a constructive trust against the estate of Mr. Town to the extent of 20% of its value, or damages.

Ms Nowell and Mr. Town had a love affair for 24 years. The affair was unknown to Mrs. Town until her husband's death. The affair and the marriage ran parallel but distinct courses. I propose to set out the facts of the two relationships separately.

Note: 2009 Amendments to the FLA

Some difficulties were experienced in the operation of the FLA's scheme for equalization of property in the first few years after its enactment, indicating a need for further reforms. In its 1993 *Report on Family Property*, the Ontario Law Reform Commission made a number of recommendations to improve the fairness and efficiency of the scheme and to ensure that the Act better met its objectives. The Commission's 1995 *Report on Pensions as Property: Valuation and Division* proposed reforms to deal with the problems raised by the sharing of a particular type of property that has distinct characteristics and raises special problems—the pension.

These proposals for reform were not acted upon for many years. In some cases judicial interpretation of the Act resolved the problems. Then in 2009, as part of a compendium bill amending many pieces of to family legislation, some changes were made to Part I of the FLA, the most significant of which was the introduction of amendments to simplify the valuation and division of pensions; see the *Family Statute Law Amendment Act*, 2009, S. O. 2009, c. 11 (Bill 133). The bill received Royal Assent on May 14, 2009. Some of the provisions came into force immediately; with respect to others, such as those relating to pension division, implementation was delayed. In the case of pension division, the delay was necessary to allow regulations working out the details of the scheme to be drafted. The final draft of the pension regulations was published on June 24, 2011 and came into force on January 1, 2012.

B. Part I of The Family Law Act, 1986

(a) application

Note: Application of the FLA to Unmarried Couples

In its *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993), the Ontario Law Reform Commission recommended that the definition of spouse found in s. 1(1) of the Ontario *Family Law Act*, which applies for the purposes of property division upon marriage breakdown, be amended to include unmarried, heterosexual cohabitants who have cohabited for a period of at least three years or who have had a child. This recommendation has not been implemented and unmarried couples thus do not receive the benefit of a presumption of equalization of net family property based on the partnership principle.

The use of s. 15 of the Charter to challenge to the continued exclusion of unmarried cohabitants from statutory rights to a division of matrimonial property has been unsuccessful: recall the Supreme Court of Canada's decisions in *Nova Scotia (Attorney General) v. Walsh*, [2002] 2 S.C.R. 325, 32 R.F.L. (5th) 81 (sub nom *Walsh v. Bona)* and *Quebec (Attorney General) v. A*, 2013 SCC 5, both found in volume I of these materials. Given that extension of matrimonial property rights to unmarried couples is not mandated by the Charter, the choice remains with the provincial legislatures.

Some Canadian jurisdictions extended matrimonial property legislation to unmarried couples before the S.C.C.'s decision in *Walsh.* The Northwest Territories was the first. Under the *Family Law Act*, S.N.W.T. 1997, c. 18, the definition of spouse for the purposes of matrimonial property rights was extended beyond married couples to include a man and woman who had cohabited for a period of at least two years or had cohabited in a relationship of some permanence and were together the natural or adoptive parents of a child. The N.W.T. legislation was subsequently adopted by Nunavut. In June of 2002, the definition of spouse was amended to include individuals in same-sex relationships. Both Saskatchewan and Manitoba followed suit, extending their matrimonial property legislation to unmarried couples, including same-sex couples. In Saskatchewan, the *Miscellaneous Statutes (Domestic Relations) Amendments Acts, 2001 (No. 2)*, SS. 2001, c. 51 changed the definition of spouse for the purposes of the *Family Property Act* to cover any two persons who have cohabited for a period of not less than two years. In Manitoba, The *Common Law Partners Property and Related Amendments Act*, S.M. 2002, c. 48 (proclaimed in force June 30, 2004) extended property rights to common law partners of either sex. The definition of "common law partner" covers any two persons who have cohabited in a conjugal relationship for at least three years or for a period of at least one year where the parties are together the parents of a child.

Several other provinces chose to partially extend property rights to unmarried couples by allowing them to "opt in" to the legislative scheme of property division governing married couples. Newfoundland was the first to choose this route (see *Family Law Act*, R.S. Nfld.1990 c. F-2, s. 63; as a result of amendments in July, 2001, the "opt in" was extended to same-sex partners). As part of a package of legislative amendments in 1997 intended to extend rights to same-sex couples, British Columbia granted unmarried couples the ability to opt into the matrimonial property regime by domestic contract (see the *Family Relations Amendment Act, 1997*, S.B.C. 1997, c. 20). Nova

Scotia enacted a more extensive scheme providing for registered domestic partnerships. The scheme allows unmarried couples, whether same-sex or opposite-sex, to register their relationships and be subject to many of the rights and obligations as married persons, including property division upon breakdown of the relationship (see *Law Reform (2000) Act*, S.N.S. 2000, c. 29 effective as of June 4, 2001). Quebec passed similar legislation in June of 2002 providing for "civil unions"; initially civil unions were confined to same-sex couples, but were subsequently opened up to opposite-sex couples as well.

The Supreme Court of Canada decision in *Walsh* produced legislative inertia with respect to any further inclusion of unmarried couples in matrimonial property legislation for many years. However British Columbia recently departed from this pattern. As part of a bold program of family law reform, B.C. enacted a new *Family Law Act*, S.B.C. 2011, ch. 25, replacing its existing, highly discretionary matrimonial property regime (based on the distinction between family assets and non-family assets) with a deferred community scheme (similar to that in Ontario). Unmarried couples who have cohabited for 2 years (or less time if they have a child) are included in the legislation., which came into force in March of 2013. See http://www.ag.gov.bc.ca/legislation/family-law/index.htm

Ontario has not taken any such legislative initiative. Absent a cohabitation agreement providing for sharing of property, unmarried couples in Ontario must rely on doctrines of unjust enrichment and constructive trust to receive a share property other than according to legal title, although the *Kerr* decision has made such claims somewhat easier when the parties' relationship can be characterized as a joint family venture.

Note: Application of Matrimonial Property Law to Aboriginal Women

In *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, the Supreme Court of Canada ruled that provisions in British Columbia's *Family Relations Act* dealing with division of matrimonial property were not applicable to lands on First Nations reserves. The Court concluded that the provisions were in conflict with the provisions of the *Indian Act* which give the Minister the right to control the possession and occupation of lands on reserves by issuing certificates of possession and occupation. The *Indian Act* does not provide for marriage breakdown, property division, or for situations of domestic violence and protective orders to keep the abuser out of the family home. The legal question framed in *Derrickson* was whether a partition of reserve lands under provincial family legislation would be an encroachment on the federal authority over "Indians and Lands reserved for Indians" found in s. 91(24) of the *Constitution Act, 1867*. The Court did not consider the underlying issue of why the dispute was one of the division of powers over First Nations lands and not a matter of Aboriginal custom regarding marriage breakdown and its land consequences. As a result of this ruling, Mrs. Derrickson's application, pursuant to the B.C. *Family Relations Act,* for an undivided one-half interest in the properties on the reserve for which her husband held certificates of possession was dismissed. She was, however, granted a monetary compensation order in lieu of an order directing actual division of property.

It appears that the ruling in *Derrickson* means that provincial matrimonial property laws are inapplicable to lands on First Nations reserves to the extent that they attempt to deal with the ownership, possession, or occupation of land. This leaves open the possibility that schemes of matrimonial property such as Ontario's *Family Law Act,* which are more in the nature of debtor-creditor legislation and which provide for the sharing of the monetary value of property rather than sharing of the actual property itself, would be

applicable to Aboriginal persons living on reserves. However provincial law with respect to possessory rights in the matrimonial home is clearly inapplicable and courts may not make orders for the disposition of interests in the matrimonial home. (This is discussed further in Chapter VI of the materials, below, which deals with the matrimonial home.)

Mary Ellen Turpel ("Home/Land" (1991), 10 *Can. J. Fam. L.* 17) states that it is not the commodity character of matrimonial property that is vital to Aboriginal women:

> The fair division of the matrimonial home upon marriage breakdown is seen to save women and children from financial breakdown and impoverishment. While this is undoubtedly the case for non-aboriginal people, when the context of aboriginal marriages is considered, especially when the spouses are living on the reserve, the situation must be appreciated as being different because of a combination of economic, cultural and linguistic factors.
>
> Access to matrimonial property does not save aboriginal women from impoverishment because the value of a possessory interest in reserve land is circumscribed by restrictions on alienation and the limited interest (mortgagability) in the property. Moreover, aboriginal peoples on reserves already live far below the poverty line in Canada. Consequently, theories of economic partnerships and a woman's access to the home as an important commodity do not apply to aboriginal peoples as they would in a non-aboriginal context. Indeed these theories arguably devalue the significance of the matrimonial home for aboriginal women.
>
> The significance of matrimonial property for aboriginal women must be understood in the context of what the reserve represents: it is the home of a distinct cultural and linguistic people. It is a community of extended families, tightly connected by history, language and culture. It is often the place where children can be educated in their language and with culturally-appropriate pedagogies. The reserve home is generally not that of a nuclear family—parents, grandparents, brothers, sisters and others in need will all share a home. The home may be the only access a woman and her children have to their culture, language and family. The economic value of the land is secondary to its value as shelter within a larger homeland—the homeland of her people, her family.
>
> The second aspect of matrimonial property theory that infuses this area, the notion of equality of the spouses, is similarly, not entirely applicable in the aboriginal matrimonial contest. In most aboriginal communities, the belief is that women, children and elders come before men and the responsibility of the men is to live life as a good helper toward women, children and elders. Traditional tribal control of property did not lead to the victimization of aboriginal women....
>
> [The decision in *Derrickson* sanctions] a situation which is completely opposite to that of the customs of many tribes. There are no obligations on aboriginal men now recognized at law to provide shelter for women, children or elders. Indeed, customary law has no place in matrimonial property disputes as Canadian law will not recognize it—it is the federal or provincial government which exercises jurisdiction over Indians upon marriage breakdown. The impact of this oppression of aboriginal custom on communities cannot be underestimated. When men no longer have to fulfill their responsibilities to women, children and elders, the social control network of the community disintegrates and respect for social responsibilities is lost.

For many years the federal government has being trying to pass legislation dealing with matrimonial property on reserves. The legislation has been contentious and many times the draft legislation died on the order paper when a parliamentary session was dissolved. However, Bill S-2, called *Family Homes on Reserves and Matrimonial Interests or Rights Act* received royal assent on June 19, 2013. For more information on the new act see: http://www.aadnc-aandc.gc.ca/eng/1317172955875/1317173115233.

Briefly, the Act applies to matrimonial real property on reserves (i.e. homes and other immovable assets). The legislation puts in place provisional federal rules regarding matrimonial real property and also creates a mechanism for First Nation communities to enact their own matrimonial real property laws. The law has not yet been proclaimed in force and the federal government has indicated that there will be a 12 month transitional period to allow first nations communities to enact their own laws.

The default federal provisional rules provide for joint possessory rights in the matrimonial home while spouses (both married and common law) are living together and impose controls on disposition and encumbrance of interests in the home during the relationship without the consent of the other spouse. Orders may be granted excluding one spouse from the home in cases of family violence and after the relationship has broken down to meet the interests of children who reside in the home. On the breakdown of the relationship each spouse is entitled to an amount equal to one half of the value of the interest or right that this held by one of them in the family home and any other matrimonial interests or rights.

NOTE: Equalization Schemes and Bankruptcy

Matrimonial property laws in Canada are of two different sorts. Some provincial matrimonial property regimes are actually "property division" schemes in that property interests vest on the occurrence of a triggering event, such as separation; this would include the schemes in B.C., Alberta, Saskatchewan, Nova Scotia and New Brunswick. The other provinces, like Ontario, have equalization regimes, under which a triggering event such as separation simply gives rise to an entitlement to an accounting, the result of which will be an order for a monetary payment to effect equalization. No property interests arise as a result of separation; the act creates a debtor-creditor relationship. The recent decision of the Supreme Court of Canada in *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 SCR 605, which arose in Manitoba which is also an equalization province, illustrates one of the disadvantages of equalization schemes: if the titled spouse claims bankruptcy after separation and before the equalization payment has been made, the untitled spouse's claim to equalization will simply be treated as a claim provable in bankruptcy and can be released (i.e. wiped out) by the bankruptcy, leaving the claimant spouse without a remedy. In *Schreyer*, the SCC called for legislative reform to ensure that the principles of bankruptcy law and family law are compatible rather than operating at cross-purposes. For further discussion of this issue see Susan Boyd and Janis Sarra, "Out in the Cold: *Schreyer v. Schreyer*'s Call for Law Reform" (2011) 27 *Canadian Journal of Family Law* 97.

(d) Valuation and Valuation Date Assets

(i) Valuation Date

The first step in the calculation of NFP is for each spouse to list and add up all of the assets they own on the valuation date (referred to as "V-day"). This requires determining the valuation date. Although s. 4(1) of the *Family Law Act* lists five potential valuation dates depending on the circumstances of the case, the most frequent will be the first listed, *i.e.*, "The date the spouses separate and there is no reasonable prospect that they will resume cohabitation." Although some of the cases draw on case law under the *Divorce Act* defining "living separate and apart", the analogy may not be exact, given the additional requirement of no reasonable prospect of the resumption of cohabitation. As well, because it is tied to the valuation of property, the issue of date of separation may have a different significance in the matrimonial property context from the divorce context: for example, in a situation of rising property values, a later rather than earlier separation date will result in a larger value of property to be divided. What follows is a brief review of cases dealing with how courts have handled this issue under the *Family Law Act*. As well, you should refer back to the discussion of valuation date in Goodman, "Matrimonial Property," above.

In *Czepa v. Czepa* (1988), 16 R.F.L. (3d) 191 (Ont. H.C.), the parties were married in Poland in 1971. The husband moved to Ontario in 1981 to take up employment with the intention to rejoin his wife later with money to upgrade their lifestyle. In 1982 he became involved with another woman. When his wife found out about the relationship in 1984, he attempted to mollify her instead of acknowledging the marriage was over and reassured her he would be returning. In 1986 the husband petitioned for divorce and the wife claimed a division of matrimonial property. Killeen L.J.S.C. held that given the husband's conduct and representations to the wife, there was a reasonable prospect of reconciliation until the husband petitioned for divorce, and so set the separation date as the date on which the husband filed for divorce (in spite of the fact he had entered into a new relationship several years previously).

In *Lessany v. Lessany* (1988), 17 R.F.L. (3d) 433 (Ont. Dist. Ct), the parties were separated in Dec. 1986. The husband missed the children and suggested reconciliation in the summer of 1987. The parties lived together for two months but things deteriorated quickly. McCart D.C.J. held the separation date to be December 1986, concluding that from Dec. 1986 until Aug. 1987 there was no reasonable prospect of reconciliation, just a faint hope. The nature of the renewed living together was not "cohabitation".

In *Ricci v. Cacciatore-Ricci* (1989), 16 A.C.W.S. (3d) 435 (Ont. H.C.) the parties were married in 1980. A few months later, the husband left for Italy to do research for his Ph.D., and subsequently he worked in both Sudbury and Ottawa. All the while, his wife remained in Toronto. The parties spent time together on weekends and holidays. In October 1985, after a heated telephone argument, they severed further communications. For the purposes of the valuation date, the husband argued the separation took place in Sept. 1982, when he went to Ottawa to teach. He claimed that the time spent together on weekends, holidays, and vacations in Italy were attempts at reconciliation rather than cohabitation. Cusson L.J.S.C. held that the parties separated in Oct. 1985, and stated that cohabitation was a state of mind and that a couple could be cohabiting even if they physically lived in separate locations for considerable lengths of time. The wife did not consider herself separated until Oct. 1985. The husband's actions were not those of a man who considered himself separated.

In *Oswell v. Oswell* (1990), 28 R.F.L. (3d) 10 (Ont. H.C.J.), the parties were married in 1977 on the day before the husband's 55th birthday. The wife was 33. It was a second

marriage for both of them. After the wife committed adultery in 1984, the husband wanted to separate, but the wife did not. The husband contended that he and his wife lived separate and apart under the same roof since that date. The wife contended that they did not begin to live separate and apart until March 1988 when the petition for divorce was filed. The parties attended social activities together. They took vacations together in 1985, 1986, and 1987. Although the parties stopped having sexual intercourse after Aug. 1985, and the husband moved out of the master bedroom, yet on vacations, or when they had overnight guests, the parties occupied the same bed. The parties went to marriage counselling and to a therapist together, to improve their communication. The husband gave the wife a fur coat in the winter of 1986-1987. In March 1987 the husband went with the wife to London to help out at her father's funeral. In 1987 the husband threw a party for the wife to celebrate her graduation from college, and flew her mother over from London to attend. The parties often shared meals and grocery shopping until early 1988. If the husband was not going to be home for dinner, he would let his wife know. The wife continued to do some hand laundry for the husband until the petition for divorce was served. They had a joint subscription to the opera until the 1988 opera season, and attended the opera together three times in Jan. 1988. They shopped for gifts for the husband's family together, and the wife also bought presents for the husband's daughters on her own. The husband did not begin to see other women socially until after the petition for divorce was served. In 1987 and 1988 the husband indicated on his tax returns that his status was married, rather than separated, and he deducted a portion of his wife's tuition as an expense. As late as Jan. 1988 there was some discussion of reconciliation. The court found the separation date to be Jan. 1988.The husband's appeal with respect to the date fixed by the trial judge as the separation date was dismissed by the Ontario Court of Appeal ((1992), 43 R.F.L. (3d) 180).

In *Torosantucci v. Torosantucci* (1991), 32 R.F.L. (3d) 202 (U.F.Ct.) the husband moved out of the home in early 1983 to live with his father-in-law. The father-in-law died in June of 1983 and the husband moved back into the home to be near the children and because it was cheaper than living on his own. From the time he moved back until the date when he moved out of the house in 1989 the parties led largely separate lives under the same roof. The wife argued, however, that there was a reasonable prospect of reconciliation at least until late 1988 or early 1989 and that during this period she continued to hope that things would work out. The court ruled that the valuation date—the date the parties separated with no reasonable prospect of reconciliation—was June 1983. The court's comments on the test of "reasonable prospect of reconciliation" (at p. 206) have often been referred to subsequent cases:

> A reasonable prospect of reconciliation must be more than wishful thinking on the part of either party. There must be more than residual affection that may linger by one or both of the parties. The Act does not speak of a "prospect" of reconciliation but a "reasonable prospect". The Oxford Concise Dictionary 7th Edition, defines prospect as "expectation, what one expects." The question is whether a reasonable person, knowing all of the circumstances, would reasonably believe that the parties had a prospect or expectation of resuming cohabitation. I do not doubt that Mr. and Mrs. Torosantucci wished that their marriage would have been otherwise than it was. I accept, on the part of Mr. Torosantucci, that he retained, and continues to retain, some degree of affection for her. But wishful thinking is not the stuff of reconciliation. There must be some indication or step taken by both of them in that direction. In this case, no attempt was made to mediate or reconcile their differences, no counselling from third parties was sought and most importantly no meaningful discussions ever took place between them as to if, how or when their marriage might be put back together.

In *Bilas v. Bilas* (1994), 3 R.F.L. (4th) 354 (Ont. Gen.Div.), the fact that the parties continued to see a marriage counsellor precluded a finding that they lived separate and apart under the same roof.

(ii) Determining Ownership of Assets

After the valuation date has been determined, each spouse must list all "property" that he or she owns on that date and assign it a value as of that date. The materials that follow deal with what interests fall within the definition of "property". You should begin by looking at the definition of "property in s. 4(1) of the FLA. As well, you should refer back to the discussion of "property" and "owned and trust doctrines" in Goodman, "Matrimonial Property," above.

M.A. Fredricks, "The Ownership Conundrum"
in *Matrimonial Affairs*, CBAO Family Law Section Newsletter, May, 1990

The Supreme Court of Canada decision in *Rawluk* has confirmed that the first step in determining Net Family Property ("NFP") is the determination of ownership of all the property. The result of such determination often has a dramatic impact on the final outcome of the case. Although we may be tempted to say that what you make on the ownership, you lose in the equalization, this is just not the case where one party's NFP is zero, or where there is post v-day change in value.

The *Family Law Act* ("FLA") has failed to provide for the simple, fair and orderly "division" of property on marriage breakdown because it does not address ownership issues clearly, if at all. The FLA creates rights associated with property but it does not change much until death or separation. Even then, it doesn't change ownership except as a remedy. So we are left with fundamental problems in dividing property. What's to divide? In family situations, almost everything. Heresy you say? It's true. Jointly-owned property must be divided when the owners "divide". Most owners seem to believe that anyway. Property claimed by more than one party must also be "divided", in a broad sense of the word. Property registered in the name of one person but claimed by another and property in which the proportion of ownership is in dispute must also be divided.

The Act does not help us. It seems to assume that in families, ownership of assets is as clearly understood as it would be in a well-managed commercial relationship. This is simply not the case and when it mandates the equalization of NFP, it is mandating building on quicksand. No wonder then so many victims of marriage breakdown are mired in disastrous litigation. The reality is that in families, no one really knows who owns what or how such of it. Almost every client I have ever had, has asked me "who owns the furniture"? How in the world should I know? What is worse is that some counsel seem to think that all furniture is jointly owned, as if we had "community of furniture" as our property regime .

I tell my clients that ownership of property is determined by the following rules:

1. If you bought it with your own money, it is yours;
2. If you bought it with your spouse's money, it is theirs;
3. If you bought it with both parties money, it is "ours", in proportion to contribution;
4. If you received it as a gift, it is yours;
5. If your spouse received it as a gift, it is theirs;
6. If it was a gift to both, then it is "ours" in proportions intended by the donor;
7. Inheritances are the same as gifts;
8. If you owned it and gave it to your spouse, it is your spouse's (*e.g.* engagement ring);
9. If your spouse owned it and gave it to you, it is yours;
10. If you can prove a common intention as to ownership that will govern;
11. If you contributed to property owned by your spouse, it is part yours in proportion to contribution;
12. If in doubt it is yours.

companies owned by Revelston Co. Ltd. Using this approach, the expert valued the husband's business interests at $14 million as of March 13, 1981.

The valuator retained by the wife used a "notional sales" approach which attempted to determine the "intrinsic" or theoretical value of the underlying companies, rather than relying on actual public trading prices. The expert considered the husband to be part of a control group, and thus valued his shares on an "en bloc" basis, based entirely on the pro rata value of the control group's underlying business interests without regard to public trading prices. The rationale behind this approach is that stock market prices incorporate minority discounts and reflect temporal market forces as opposed to underlying long-term investment value. Using this approach, the expert valued the husband's business assets at $34 million.

A third expert, retained by the husband to review and comment on the first valuation provided to the husband, concluded that the first expert had overvalued the holding companies by not reflecting a minority discount with respect to the husband's holdings, and by not incorporating certain other relevant discounts. The third expert put the value of the husband's business assets at $9 million.

WALSH J.:... Given the magnitude of the disparity between the experts as to the value of the husband's business interests on valuation date, ranging from $9,000,000 to $34,000,000, the oft-repeated observation [p. 473] of Viscount Simon seems appropriate (*Gold Coast Selection Trust Ltd. v. Humphrey*, [1948] A.C. 459, [1948] 2 All E.R. 379 (H.L.)):

> Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible.

In weighing and assessing all of the evidence adduced and the merits of the opposing opinions advanced, I found the following facts to be the most determinative of the value of the husband's business interests: the highly illiquid nature of those interests and the substantial third party debt to which they were subject; that a purchaser of them would not be buying control or a route to control of their underlying public companies; and a comparison of the actual prices that were paid in arm's length transactions between shareholders.

Accordingly, I find and accept $14,707,000 as being the value of the husband's business interests on 13th March 1981. I was not persuaded that the evidence supported the downward revision of this amount as proposed by the husband and accepted by his valuator.

[Other parts of the decision dealing with deductions and exclusions are reproduced below.]

Susanne Goodman, "Matrimonial Property"
in *Family Law: Reference Materials*, Law Society of Upper Canada, Department of Education, Bar Admission Course Materials, August 1999, Chapter 5
(footnote numbering altered)

3.10 Valuations and Appraisals

(3) Considering Tax Obligations and Other Costs of Disposition

When valuing a person's interest in a company, for example, the question arises as to whether it is appropriate to deduct from that value the tax obligation that would be imposed on the person if he or she were to sell his or her interest in that company. When the assets of a party consist of real estate, does one deduct from the value the capital gains taxes which might be payable and the real estate commission which would likely be payable on the ultimate sale of the properties? When valuing an RRSP, ought one to deduct from it the tax which would be payable if the RRSP

were collapsed? It seemed apparent from the judgment of Potts J., in *Kelly v. Kelly*,[1] that it would be appropriate to deduct the present value of the contingent tax costs of disposition when determining values for purposes of this Act. However, it was clear from his reasons that the discount on the value of the property cannot always be calculated with mathematical certainty because of the various contingencies. In that case, Potts J. ordered that the calculation of Mr. Kelly's taxes on the sale of his properties when sold should be based on Mr. Kelly's taking advantage of one-half of any tax losses and one-half of his lifetime capital gains exemption which he had available to him. The wife in that case had asked the court to consider the full exemption and all losses available to Mr. Kelly in order to minimize the deduction of taxes and maximize the value of the property for equalization purposes. Mr. Kelly, however, had taken the position that he might choose not to take advantage of the exemption or losses which were available to him and, therefore, the maximum tax ought to be deducted from the properties' values. Potts J.'s decision fell mid-way between the parties' positions.

In other decisions such as *Rawluk*,[2] the courts declined to deduct taxes from the value of assets of the husband. In the former case, Walsh J. felt that there would be tax implications for both parties on the sale of their interests in the properties which he had held were owned equally by them. "For uniformity", he allowed no deductions from value for the costs of disposition on any items.

The value of a pension has always been discounted to take into consideration the fact that the pension will be taxed when ultimately received.

Thus, prior to March 1988, the deduction of notional costs of disposition in respect of property, other than pensions, was a matter which was very much in the discretion of the court.

In March 1988, in *McPherson v. McPherson*,[3] the Court of Appeal dealt with the issue of costs of disposition for the first time since the FLA came into force. The husband's company was valued by the trial judge at one million dollars and, therefore, he ordered the husband to pay the wife $500,000. The Court of Appeal held, among other things, that the trial judge ought to have considered the tax repercussions which would have resulted when the husband tried to satisfy the judgment. In valuing the company, the trial judge ought to have considered that whether the husband sold shares or assets to satisfy the judgment, he would have attracted substantial capital gains. If he were to take the money out as salary or dividends, he would have to pay significant income taxes. If the husband were to borrow the money, it would be non-deductible as a business expense and payable, therefore, out of tax-paid money. The court held that it made "little sense...to visit the entire costs of disposition on one spouse" when dealing with the division of family property. Like the benefits, the costs are to be shared equally.

With respect to a general rule relating to the deduction of notional taxes and costs of disposition in calculating property values, Finlayson J.A. stated:

> The cases appear to turn on their own facts and, if I might hazard a broad distinction, an allowance should be made in the case where there is evidence that the disposition will involve a sale or transfer of property that attracts tax consequences, and it should not be made in the case where it is not clear when, if ever, a sale or transfer of property will be made and thus the tax consequences of such an occurrence are so speculative that they can safely be ignored.

The Court of Appeal figured the tax to be between 25 per cent (capital gains tax) and 50 per cent (income tax) and, therefore, applied a 30 per cent discount to the value of the company.

There were some who said that *McPherson* stood for the proposition that only where assets will have to be liquidated or taxes will necessarily be incurred in order to pay the equalization payment is a person entitled to deduct these costs in valuing his or her assets. The cases since *McPherson* do not appear to have been so strict in their interpretation.

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[1] *Kelly v. Kelly* (1986), 50 R.F.L. (2d) 360 (Ont. H.C.).

[2] *Rawluk v. Rawluk* (1990), 23 R.F.L. (3d) 337 (S.C.C.), aff'g (1987), 10 R.F.L. (3d) 115 (Ont. C.A.), aff'g (1986), 3 R.F.L. (3d) 113 (Ont. H.C.).

[3] *McPherson v. McPherson* (1988), 13 R.F.L. (3d) 1 (Ont. C.A.).

On September 11, 1990 the Court of Appeal in *Starkman v. Starkman*[4] held that the principle enunciated in *McPherson* applies to property divisions under the FLA. In this case, the Court of Appeal declined to deduct the tax costs which the husband would have incurred if he had sold his business and collapsed his RRSP's. The Court of Appeal found that the husband was not going to do either of those things.

The question still remained as to how imminent the disposition of an asset must be before a court would deduct the notional costs of disposition. It seemed clear that if an asset must be disposed of to enable a person to make the equalization payment, such costs would be deducted. It was also likely that if assets had actually been listed for sale prior to the valuation date or were clearly going to be sold in the not-too-distant future, such costs would likely be deducted.

In *Sengmueller* v. *Sengmueller*,[5] the Ontario Court of Appeal has again addressed the issue of the deduction of notional costs of disposition. The Court approved the general terms of *McPherson.* It held that it is appropriate to take the notional costs of disposition into account in determining a party's net family property if there is sufficient evidence, on a balance of probabilities, that a disposition will take place at a particular time in the future and if it is clear that such costs will be inevitable when the owner disposes of the assets or is deemed to dispose of them. If this is the case, then the costs are not speculative and should be allowed. The Court stated that for the purposes of determining a party's net family property, any asset is worth only the amount that could be obtained on its realization, regardless of whether the accounting is done as a reduction in the value of the asset or as a deduction of a liability. Allowances for tax are not restricted to situations where the payor of the equalization payment must dispose of an asset that would attract tax liability in order to make the payment.

McKinlay J.A. noted that RRSPs, in particular, are taxed in full, regardless of the time of their realization, whether they are cashed in total, or taken by way of annuity. She also noted that in dealing with businesses, one should fairly consider the nature of the business, the possible requirement that the business could only operate if the owner spouse continued to be involved, any shareholders' agreement which required the sale of a party's shareholding in specified circumstances, and myriad other possible considerations in the individual case. Different considerations will be relevant in dealing with other types of assets.

Therefore, three basic principles will apply in determining whether and what costs of disposition will be deducted in determining each party's net family property:

(1) One must apply the overall principle of fairness that the costs and benefits of the disposition of assets should be shared equally.
(2) One must deal with each case on its own facts, considering the nature of the assets involved, evidence of the expected time of the disposition, the likely disposition cost at that time and the present value of those costs as of the valuation date.
(3) One must deduct the disposition costs before arriving at the equalization payment, except where it is not clear when, if ever, there will be a realization of the property.

NOTE: 2009 Amendments and Notional Disposition Costs

Note that the 2009 amendments to the FLA added a new s. 4(1.1) which indicated that any applicable contingent tax liabilities in respect of property were to be included within the notion of a spouse's debts and liabilities. This amendment both acknowledges that such costs are to be considered but also suggests that they are not part of the valuation process, but the subsequent step of deducting from the value of assets the value of debts and liabilities.

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[4] *Starkman v. Starkman* (1990), 28 R.F.L. (3d) 208 (Ont. C.A.).
[5] *Sengmueller v. Sengmueller* (1994), 2 R.F.L. (4th) 232 (Ont. C.A.).

(e) deductions and exclusions

After a spouse has calculated the total value of his or her V-day assets, the next steps in the calculation of NFP are a series of deductions—of V-day debts and liabilities, of the net worth of property brought into the marriage (the date of marriage or DOM deduction), and of the value of certain assets (excluded property) which are not to be included in NFP. For a general overview, refer back to Goodman, "Matrimonial Property" (topics 6 and 7). The materials that follow will deal with some of the more difficult issues that arise with respect to these deductions.

In calculating NFP a spouse is allowed a deduction for V-day debts and liabilities. What happens if debts exceed liabilities? The following extract deals with the issue of whether the Act provides for sharing of debts.

Berend Hovius and Timothy G. Youdan, *The Law of Family Property*
(Toronto: Carswell, 1991) at 383-389

Negative Net Family Property

In determining an equalization claim, a spouse's net family property cannot be a negative figure. If the computation of a spouse's net family property results in a negative figure, the spouse's net family property is deemed to be equal to zero by section 4(5).

The computation of a spouse's net family property will result in a negative figure whenever the total value of the deductions a spouse can claim exceeds the value of included property owned by the spouse on the valuation date. For example, a spouse may owe debts which exceed the value of property which must be included in the calculation of net family property. If, therefore, a spouse has sufficient included property, the debt will result in a reduced net family property regardless of the nature of the debt. In this situation the debt will, in effect, be shared by both spouses. Although the responsibility for payment of the entire debt will remain with the debtor spouse, its deduction from the net family property causes both spouses to share the financial burden equally. However, where the spouse who is liable for the debt has not acquired included property with sufficient value to offset the debt, the resulting negative net family property is deemed to equal zero. As a result, the portion of the debt which caused the negative net family property is ignored.

In part, section 4(5) reflects the recommendations of the Ontario Law Reform Commission in its 1974 *Report*. In addressing the question whether a debt should be allowed to result in a negative residuary estate (this was the term used by the Commission to describe the concept called the net family property in the Act), the Commission acknowledged that the recognition of a negative residuary estate would be analogous to the usual law and economics of business and professional partnerships. Moreover, this would permit the sharing of losses as well as gains and so produce a symmetrical scheme. Nevertheless, the Commission recommended that, subject to one exception (analyzed below), a spouse's post-nuptial debts and liabilities should be taken into account only to the extent that they resulted in the reduction of the residuary estate of that spouse to zero. The Commission noted the possibility that "if a negative net or residuary estate were caused by the business or professional misfortunes of a husband, it was quite likely that a wife would have made no contribution to the situation. She may have been unaware of it and, even had she known, she may have had no means of preventing it. The Commission also felt that change to the existing law should not be any more drastic than necessary:

> Full participation in gains, as of right, will be a new concept in the law of Ontario, but it is a necessary step in view of the present imbalance in the economic positions of the partners in a marriage. Full sharing of losses may seem to follow as a matter of theoretical symmetry, but, unlike

> the sharing of gains, this would not necessarily be an advance towards the goal of minimizing economic disadvantages.

Nevertheless, the Commission would have allowed an exception to the rule that there be no negative net family property. It suggested that "there should be a sharing of debts unpaid at the termination of the matrimonial property regime that were assumed for the purpose of discharging either the obligation to support children of the marriage or for the purpose of contributing towards the mutual support of both spouses." It reasoned:

> In the normal course of events, financial provision to meet these obligations will be a matter of private arrangements between the spouses. Upon the termination of the matrimonial property regime, however, it may appear, as a matter of formal legal responsibility that one spouse must undertake to discharge a disproportionate share of these liabilities, notwithstanding that they were incurred pursuant to specific legal obligations that are essential for the maintenance and benefit of the family as a whole.

To ensure the sharing of family debts, the Commission recommended that "whenever the debts of one spouse exceed his or her assets, the spouse responsible for the payment of debts in these categories should be allowed to claim a negative residuary estate to the extent that the subtraction of the amount of such debts causes his or her residuary estate to become a negative figure.

Section 4(5) of the *Family Law Act* gives effect to the main recommendation of the Commission, but it does not implement the suggested exception. A spouse's net family property is deemed to be zero regardless of the nature of the debts which caused the negative figure. However, the suggested exception is partially recognized in section 5(6). Section 5(6)(f) specifies that one of the items that a court must consider in determining whether equalization of the net family properties would be unconscionable is "the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family." Consider the following situation:

> On the valuation date, a wife has included assets valued at $1,000. She owes her mother $5,000 as repayment of a loan used to pay for some of the living expenses of the family. Her N.F.P. would be -$4,000 but for section 4(5) which deems it to be $0. Her husband has acquired some assets during the marriage and has no debts related to the day-to-day living expenses of the family. His N.F.P. is $10,000.

Clearly, the wife has incurred a disproportionately larger amount of debt for the support of the family than the husband. A court might conclude, in light of section 5(6)(f), that it would be unconscionable simply to equalize the net family properties were merely equalized, the husband would be left with a net gain during the marriage of $5,000 and the wife's net gain would be only $1,000 after payment of the debt. An order requiring the husband to pay the wife $7,000 is possible (indeed, probable) under section 5(6). In this way, the husband and wife effectively share the debt.

However, the inclusion of paragraph (f) in section 5(6) is not the same as providing for the sharing of family debts in the manner recommended by the Commission. First, section 5(6) creates a discretionary power which may or may not be exercised. In some situations it may be difficult to convince a court that equalization of net family properties is "unconscionable" even though one spouse has incurred a family debt which resulted in a negative figure in the computation of net family property. Second, section 5(6)(f) only applies when one spouse has incurred a disproportionately larger amount of debt than the other spouse for the support of the family. If the above example is changed slightly, section 5(6)(f) might not apply even though the computation of the wife's net family property resulted in a negative figure due to the existence of a family debt. If the husband also incurred a family debt of $5,000, it is questionable whether one could conclude that the wife incurred a disproportionately larger amount of debt for the support of the family. Perhaps the court would resort to the "catch all" factor listed in section 5(6), namely, paragraph (h), to justify an unequal sharing of net family properties. However, this is

problematic and would likely depend on all the circumstances of the case. Third, it is doubtful whether section 5(6) can be used to order one spouse to pay a sum that is greater than the spouse's net family propery. If it cannot, then section 5(6) provides no remedy where the debt which resulted in a negative figure in the computation of the net family property of one spouse exceeds the value of the other spouse's net family property. Returning to the original example, if the husband's net family property is only $1,000, then it is likely that section 5(6) only permits the court to order the husband to pay $1,000 to the wife. She would still be responsible for the $5,000 debt and would leave the marriage with a loss of $3,000. The husband would have no gain or less and would, in effect, only have contributed $1,000 to the repayment of the debt.

For the reasons given by the Commission, it seems fair that spouses should generally share debts incurred for the support of the family whether or not they are offset by assets acquired during the marriage. To implement this policy, the legislature might have adopted the Commission's recommendations regarding the possibility of negative net family properties.

Alternatively, it could have granted the court authority to divide family debt between the spouses, although this approach seems more appropriate where there is an actual sharing of family assets on marriage breakdown. The Ontario legislature did neither. Instead, as evidenced by the existence of section 5(6)(f), it appears to have accepted the Commission's ultimate goal but chosen a less effective means of ensuring its realization.

It is not only the existence of debt which can result in a negative figure in the computation of a spouse's net family property. A negative figure also occurs where the pre-nuptial property deduction exceeds the value of included property. For example, a spouse may have suffered a capital loss in relation to his or her ante-nuptial property which is not offset by the value of other included property. Alternatively, a spouse may have sold ante-nuptial property to provide funds for the living expenses of the family. Theoretical symmetry would again suggest that if gains made during the marriage are shared, losses should be also. However, the Ontario Law Reform Commission rejected this approach as "inconsistent with the purpose of the matrimonial property regime" and concluded that capital losses to ante-nuptial property should always be borne by the spouse who owned that property. It, therefore, recommended that the deductible value of ante-nuptial property should never exceed the value of such property, or of property acquired in substitution therefore, at the date of the termination of the matrimonial property regime. The Ontario legislature adopted a compromise. If the spouse has sufficient included property, then any reduction in the value of the ante-nuptial property will be reflected in a reduced net family property and it will, in effect, be shared by the other spouse. However, to the extent that any such reduction results in a negative figure in the computation of net family property, it will be ignored since section 4(5) deems the net family property to be equal to zero.

This approach might be questioned on the basis that it is inconsistent with the concept of marriage as an economic partnership. If the net gain created during the partnership by either spouse is to be shared, it might be argued that any net loss should also be shared. Even if this general concept is rejected, there may be particular situations in which the refusal to allow a negative net family property is unfair. Consider the following example:

> A husband has an investment valued at $50,000 at the time of the marriage. During the marriage he gradually uses this investment to supplement the funds needed for family expenses. He has assets worth only $10,000 on the valuation date. His N.F.P. would be -$40,000 but for section 4(5) which deems it to be $0. Meanwhile, his wife has acquired assets using her income during the marriage valued at $50,000 on the valuation date. Her N.F.P. is $50,000.

If the net family properties were simply equalized, the husband would be left with a net loss during the marriage of $15,000 and the wife's net gain would be $25,000. In this situation a court might be convinced that it would be "unconscionable" to equalize the net family properties having regard to the disposition of the husband's property and the acquisition of property by the wife. The wife might be ordered to pay more than $25,000 to the husband.

Section 5(6) might, therefore, be available once again to redress gross inequity caused in some particular circumstances by section 4(5). However, as noted above, it is questionable whether section 5(6) can be used to order one spouse to pay a sum that is greater than that spouse's net family property. It is possible, therefore, to conceive of situations where section 5(6) would provide no remedy for a spouse who has used ante-nuptial property to provide for family expenses even though equalization of net family properties seems unfair. A modified version of the example given above serves to illustrate the point:

> A husband has a investment valued at $50,000 at the time of the marriage. During the marriage he gradually uses this investment to supplement the funds needed for family expenses. He has assets worth only $10,000 on the valuation date. His N.F.P. would be -$40,000 but for section 4(5) which deems it to be $0. Meanwhile, his wife has acquired assets by inheritance during the marriage valued at $50,000 on the valuation date. Her N.F.P. is $0.

Since the wife has no net family property, it is likely that section 5(6) does not permit the court to order her to pay any amount to the husband even though she leaves the marriage with a net gain of $50,000 and her husband has a net loss of $40,000.

In light of this example, a legislative amendment to Part I might be considered appropriate. Either section 5(6) could be modified to indicate clearly that a court can order payment of a sum that is greater than the spouse's net family property or section 4(5) could be altered to permit the court to recognize a negative net family property where it is equitable to do so.

The following two cases, *Folga* and *Nahatchewitz* deal with the special treatment of the matrimonial home with respect to the DOM deduction. No DOM deduction is allowed for a matrimonial home. But what counts as a matrimonial home? The starting point is the definition of matrimonial home in s. 18 of the FLA, found in part II of the Act that deals with special rights (possessory rights) in the matrimonial home. You should at this point read s. 18 and the cases in Chapter VI of the materials below that deal with identifying the matrimonial home. However, in the context of the DOM deduction there is the further issue of the time at which a property must have been used as the matrimonial home.

Folga v. Folga

(1986), 2 R.F.L. (3d) 358 (Ont. H.C.)

[In calculating his net family property, the husband (respondent) sought to deduct the value of the matrimonial home which he owned at the time of the marriage, arguing that it had ceased to be a matrimonial home prior to the valuation date.]

GRAVELY L.J.S.C.: ... The respondent claims various deductions. The respondent owned a house at 22 Frederick Street, St. Catharines. For a short time before the marriage and for about three years afterwards, the parties lived together at that property. While they were living there, the respondent bought the Third Street, Louth, property and the parties then moved from Frederick Street to Louth and the respondent sold Frederick Street. The sale price in 1974 was $32,000, and at the time of sale the mortgage was $15,000 There is no direct evidence as to the value of that property at the date of the marriage, but drawing what inferences I can from all the evidence, I estimate the valuation of the respondent's equity at that time as $12,000.

The respondent claims a deduction for the equity in Frederick Street pursuant to s. 4(1)(b) of the *Family Law Act*. The petitioner says that there should be no deduction because Frederick Street was the matrimonial home. By the terms of s. 4(1)(b), the value of an interest in a matrimonial home may not be deducted.

Section 4(1) is a definition section. It defines "net family property" as:

amendments to the FLA, but was not pursued. Why do you think there is resistance to making this change?

SOME NOTES ON TRACING EXCLUDED PROPERTY

1. When excluded assets are mixed with non-excluded assets, it is only the portion of the v-day value of the asset that can be traced to the excluded asset that can be excluded. Thus, as a simple example, if spouse A receives a gift of $100 and then combines that with $100 of his savings to purchase an asset for $200, only $100 can be excluded from NFP. To complicate the example, assume that the asset increases in value to $400 on V-day. What portion of that value can be excluded? Clearly the $100 of the original gift. But then there is the $200 increase in value. What portion of that can be traced to the original gift? Here a pro rata approach has been adopted, with the result that in this case the answer would be half of the increase because the original gift constituted half of the initial value of the asset. So spouse A would be entitled to an exclusion of $200. For an example of a court engaging in this process of tracing and apportionment see *Oliva v. Oliva* (1988) 12 RFL (3d) 334 (ONCA). In that case the husband was gifted the down payment on certain properties during the marriage. He used the rental income from the properties to pay down the mortgage. (Recall that income from excluded property is not excluded unless the testator or donor expressly provides to the contrary). On the date of separation the properties had increased significantly in value. The Ontario Court of Appeal held that the husband could not exclude any appreciation in value due to the reinvested income

2. *Townshend v. Townshend,* 2012 ONCA 868 deals with the issue of what happens if excluded property is transferred into joint title. On the facts of the case the husband received a gift of $25,000 during the marriage. The funds were deposited into a joint bank account in the name of the husband and wife and remained there on V-day. The trial judge found that the gift lost its exclusionary character when the funds were deposited into a joint account, with the result that each spouse would include half of the value ($12,500) in their NFP. The Ontario Court of Appeal disagreed. In their view the husband had made a gift of a one half interest in the property to his wife, which was to be included in her NFP, but that his interest in the joint funds remained excluded property, and thus he was entitled to an exclusion of $12,500:

> SIMONS J.A. (Cronk and Rouleau JJ.A. concurring):
>
> [20] Nonetheless, in my view, the trial judge erred in failing to grant the husband an exclusion for one-half of the amount of the gift....
>
> [28] [This court's decision in *Colletta v. Colletta*, [1993] O.J. No. 2537], for the most part, has been interpreted as standing for the proposition that excluded property deposited into a joint account loses its exclusionary character to the extent of the one-half interest that is presumed to be gifted to the spouse: see *Goodyer v. Goodyer*, [1999] O.J. No. 29 (Gen. Div.), at para. 76; and Ilana I. Zylberman & Brian J. Burke, "Tracing Exclusions in Family Law" (2006) 25 *Canadian Family Law Quarterly*, 67.
>
> [29] In my view, this is, in fact, the correct approach. That this is so is best understood by recalling that, in addressing property issues under Part I of the *Family Law Act*, the court first determines issues of ownership before turning to questions involving calculation of the parties' net family properties ...

[30] While s. 14 of the *Family Law Act* creates certain presumptions with respect to the ownership of property, it does not address how each party's net family property is to be calculated. Rather, it is s. 4(2) that stipulates the exclusions from net family property.

[31] In relation to gifts, s. 4(2) states that, "[p]roperty, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of marriage" is to be excluded. Similarly, "[p]roperty other than a matrimonial home, into which [a gift] can be traced" is excluded.

[32] Given that the legislature made clear its intention that gifts used to purchase a matrimonial home lose their excluded character, but did not do the same in relation to monies deposited into a joint account, I discern no legislative intent that the entire amount of the gift should lose its excluded character when deposited into a joint bank account....

[33] In my view, therefore, the trial judge in this case erred in concluding that all of the gift monies lost their excluded character when deposited into a joint account.

(f) Continued Relevance of Constructive Trust

This section of the materials will deal with the availability of the doctrine of constructive trust (dealt with above) to determine initial issues of ownership in the calculation of each spouse's NFP. The initial determination of ownership can significantly influence the NFP calculation. A constructive trust may be one way a spouse can claim a share of excluded property to which he or she contributed. As well, constructive trust will make a difference in cases where property values change between valuation day (usually the date of separation) and the date of trial. In the case of rising property values, the FLA only entitles the spouse with lower NFP to a monetary payment calculated on the basis of separation date values, rather than an interest in the property and hence a right to share in any increases in value. In the case of decreasing property values, a spouse with the higher NFP will be required to make an equalization payment based on the separation date value of property, but the property may have decreased significantly in value and the spouse may not even have adequate resources to make the equalization payment. If the spouse with the lower NFP had had an ownership in the property, they would have been required to absorb part of that post-separation loss.

If the courts had been more willing initially to apply s. 5(6) to deal with the inequities created by significant changes in the value of property between the date of separation and the date of trial, the issue of resort to doctrines of constructive trust may not have arisen. However, in the early. case of *Kelly v. Kelly*, (1986), 50 R.F.L. (2d) 360 (Ont. H.C.), the court ruled that s. 5(6) could not be used to consider post-separation events and this interpretation took hold. Hence the growing attractiveness of the constructive trust and the reverse constructive trust. In 1990 the Supreme Court of Canada ruled in *Rawluk v. Rawluk*, below, that doctrines of constructive trust remained available under the FLA as part of the first step of determining the ownership piles of the spouses on V-day.

The recent decision of the Ontario Court of Appeal in *Serra v. Serra*, 2009 ONCA 105, 61 R.F.L. (6^{th}) 1, found below, which recognizes that market-driven post-separation changes in the value of property may be the basis for a departure from equalization under s. 5(6) of the F.L. A., may reduce the reliance upon claims for a constructive trust or a reverse constructive trust in the context of property litigation between married spouses.

As well, the law on constructive trust has continued to evolve since *Rawluk*, with emphasis being placed on its anchorage in the underlying doctrine of unjust enrichment. This has led to the recognition that the constructive trust is only one of several possible remedies to unjust enrichment. As we have seen, there is now a presumption in favour of monetary remedies, with the constructive trust, which grants an actual interest in the property, limited to cases involving a fairly direct causal connection between spousal contributions and the property. When a monetary remedy is awarded, it will have no advantages over an equalization of NFP as the monetary remedy will likely be calculated on the basis of separation date property values.

behest of the husband: *McDonald v. McDonald* (1988), 11 R.F.L. (3d) 321, 28 E.T.R. 81 (Ont. H.C.). So we arrive at the anomaly of the equitable remedy of constructive trust being applied against the wishes of the party found to have been unfairly treated, at the behest of the party who has been unjustly enriched. What does this leave of the maxim that he who seeks the aid of equity must come with clean hands? The fallacy at the root of such an approach is that of treating the *remedy* of constructive trust as though it were a *property interest*, which for the sake of consistency must be imposed regardless of the circumstances or of other remedies.

...

I cannot leave this question without alluding to the quite different provisions found in Acts regulating the division of marital property in provinces other than Ontario. As Cory J. points out, the relationship between the constructive trust doctrine and its "statutory equivalents" has been variously treated in different jurisdictions. While it is interesting to consider dispositions in other jurisdictions, it should be noted that the legislative provisions from province to province are not truly equivalent. In particular, none of the provincial statutes governing the division of marital property, save that of Ontario, appears to have a statutorily fixed and inflexible valuation date, the feature of the Act which gives rise to the wife's grievance in this case. ...

In this case, I conclude that the remedy of constructive trust is neither necessary nor appropriate, given the remedies available under the *Family Law Act, 1986.*

V. Conclusion

I would set aside the judgments of the Court of Appeal and the trial judge, and refer the matter back to the trial judge to determine whether an adjustment should be made under s. 5(6)(h) of the *Family Law Act, 1986*, to reflect the increase in value of the land held in the husband's name since separation, and to adjust the amount of the equalization payment due to the wife, on the basis that she is not entitled to a constructive trust vesting her with a beneficial half interest in the property as at the date of separation.

I would make no order as to costs in this court or below.

Appeal dismissed.

NOTE: REVERSE CONSTRUCTIVE TRUST

The issue of a "reverse" constructive trust was considered in *McDonald v McDonald* (1988), 11 R.F.L. (3d) 321 (Ont. H.C.) and in *Arndt v. Arndt* (1993), 48 R.F.L. (3d) 353 (Ont. C.A.). In *McDonald*, the husband's tobacco farm dropped in value from $1.6 million to $568,000 between the date of separation and the date of trial. The decline was caused by the decrease in the number of smokers and not by any fault of either the husband or the wife. At issue was whether the husband should bear the decline in value alone, or whether the wife should share in it. An order of equal division of the value of the property would have resulted in an award of $800,000 to the wife—at least $200,000 more than the value of total assets at the time of the trial. The court ruled that the wife had a 50% interest in the farm by way of constructive trust and therefore should share in the depreciation. She had made an extensive contribution to the acquisition of the properties and operation of the tobacco business during the 28 year marriage, and had almost complete responsibility for raising the five children. The court gave an alternative ruling in the event that constructive trust did not apply: it considered the size and cause of the depreciation, and ruled that under s.5(6) of the FLA the wife should share equally in the depreciation, on the ground that it would be unconscionable for the husband to have to bear the entire loss alone.

In *Arndt*, the Ontario Court of Appeal appeared to accept in principle the availability of a "reverse constructive trust," although the Court did not impose one in the case. The parties were married in 1974 and separated permanently in 1989. The wife owned

significant assets before the marriage, including what would become the matrimonial home. One of the family properties was held in the parties' joint names and the others were in the wife's name. Much of the parties' financial success was due to the wife's investments. The parties operated as a team in most aspects of their lives, but had no business contact after the marriage breakdown. The wife purchased a property shortly before the separation without consulting the husband. At trial she refused to make full disclosure of the financial status of some of her assets in the post-separation years. Overall, the property values declined significantly after the valuation day. The trial judge listed all the assets on the wife's side in the equalization accounting and refused to award an unequal division or impose a reverse constructive trust to share the post-separation decline in value of the parties' real property. The wife appealed on the grounds that the trial judge erred in failing to determine the beneficial ownership of the property before calculating the equalization payment and that equalizing the net family properties was unconscionable within the meaning of s.5(6)(h) of the *Family Law Act*.

The Ontario Court of Appeal dismissed the appeal without resolving the question of whether the reverse constructive trust applies under the *Act*. Labrosse J.A. (with whom Krever J.A. concurred) held that the doctrine of constructive trust was not applicable in this case. He found that the evidence supported the trial judge's findings. From the separation date, any business partnership had ended and the wife had refused to sell assets and had increased debts on assets. Any reduction in the value of properties had not resulted solely from a downturn in the market. In addition, because the wife had refused to disclose the financial situation of major assets post-separation, the evidence did not justify a conclusion that the husband had been unjustly enriched and that the wife had suffered a deprivation. Weiler J.A., concurring in the result on this issue, suggested in *obiter* comments that "the reverse constructive trust sits uncomfortably with trust principles." However, while casting doubt on the availability of the reverse constructive trust, she did not rule on the issue and found that regardless of whether it is possible to impose the constructive trust in equalization proceedings, the wife was not entitled to benefit from such relief.

The recent decision of the Ontario Court of Appeal in *Serra v. Serra*, 2009 ONCA 105, 61 R.F.L. (6th) 1, found below, opens up the possibility of using s. 5(6) to deal with the situation where there has been a dramatic decline in the value of property post-separation rather than the reverse constructive trust.

NOTE: ONTARIO LAW REFORM COMMISSION 1993 RECOMMENDATIONS

In its *Report on Family Property Law* (Toronto, 1993), the Ontario Law Reform Commission recommended several amendments to Part I of the FLA that would rectify problems in its operation that were leading to reliance on constructive trust doctrines. The Commission recommended that Part I be amended to permit the variation of an equalization payment to recognize a post-valuation date change in value of an asset, if such is required to reach an equitable result, having regard to the cause of the fluctuation. (The Commission recommended the addition of a new provision granting courts this discretion, rather than simply adding post V-day changes in value as a factor justifying departure from equalization under s. 5(6).) As has been discussed above, the Commission also suggested that changes in the value of assets acquired independently of the marriage (i.e. excluded assets) should be shared when those changes took place during the relationship, thus eliminating the need for reliance upon the constructive trust in situations where a spouse had contributed to the increase in value of such assets.

The Commission then examined the interaction of statutory and common law remedies for the sharing of family property between spouses. In light of the

recommendations designed to rectify the current problems with the operation of equalization, the Commission suggested that spouses who receive the benefit of statutory equalization of family property should be barred from looking also to common law remedies. In addition to its opinion that the proposals for change would correct the problems which had driven spouses to seek common law relief, the Commission referred to the uncertainty of application, the problems around evidence, and the costs of litigation when making its recommendation that the common law trust remedies should no longer be available. The following extract summarizes the Commission's recommendations with respect to the continued availability of trust remedies:

> CHAPTER 6: DO COMMON LAW REMEDIES CONTINUE TO PLAY A USEFUL ROLE?
>
> 30. Part I of the *Family Law Act* should be amended to preclude a spouse from applying as follows:
>
> (a) for a declaration of a remedial constructive trust with respect to property owned by his or her spouse, as restitution for his or her contribution, either direct or indirect, to the acquisition, preservation, or enhancement of that property.
>
> (b) for a declaration of resulting trust with respect to property owned by his or her spouse, based on the common or presumed intention of the spouses regarding his or her contribution, either direct or indirect, to the acquisition, preservation, or enhancement of that property. (at 142-43)

These recommendations were adopted in P.E.I. but not in Ontario. Do you think they should have been? Courts have in fact taken a relatively restrictive approach to constructive trust claims under the FLA (see *Straub v. Straub* below). And in *Serra* the Ontario Court of Appeal finally recognized some ability to deal with post V-day changes in value under s. 5(6). It could be argued that if further reform is required, the better path would be to enact a specific legislative provision allowing courts to depart from equalization if there has been a significant change in in the value of property post V-day. This issue will be discussed further below.

Straub v. Straub

2013 ONSC 1713

[In this very recent case, Justice McKelvey after dealing with a number of claims and cross claims that arose under the *Family Law Act*, tureds to claims made by the husband and wife for a constructive trust. The husband was seeking a constructive trust interest based on the increase in the value of the matrimonial home after the valuation date, and the wife was seeking a constructive trust claim based on the increase in the husband's stock portfolio after v-day. Justice McKelvey dismissed both constructive claims.]

MCKELVEY J:

[107] In my view, awarding of a constructive trust in favour of the applicant or the respondent would not be appropriate in this case. Both parties have taken title to substantial assets in this case. The applicant, for example, has received the home on Normandy Crescent while the respondent has taken ownership of the cottage property. There is evidence that the Normandy Crescent property has increased very substantially in value and the applicant has received the benefit of that. Similarly, the respondent has gained a benefit in the increase of his investment portfolio. I believe that one of the underlying reasons for the statutory framework for equalization of matrimonial assets is to provide a consistent and understandable approach for the equalization of matrimonial property following separation. The use of constructive trust, in my view, should not be routinely applied where the parties have the benefit of equalization under the

years. One can safely conclude that disparity in contributions prior to the valuation date should be the basis for unequal sharing of NFPs only in extreme circumstances, if ever.

NOTE: *McINNIS v. McINNIS, MARTIN V. MARTIN*

In *McInnis v. McInnis*, (unreported, Ont. Gen. Div., Nov. 90) the wife already owned the house when the couple married. The wife had a full-time job and did most of the household work. The husband did not work outside the home. He claimed to have maintained the home, but McKeown J. found that that was not so. McKeown J. said that the wife contributed $12,000 toward a major addition in 1987, while the husband chipped in only $400; and that the husband did pay $2000 toward the discharge of the mortgage in 1981, but did minimal cooking, cleaning and repairs. McKeown J. also noted that the husband retained more than $17,000 of the $27,000 he brought into the marriage. He found that the husband made no contribution to the purchase of the matrimonial home and only a minimal contribution to its maintenance. He ruled that it would be unconscionable to divide the home equally, and found that the wife was entitled to the full value, $185,000, of the home. The wife, a medical secretary who earned about $15 an hour, said that she "lived like a pauper" to buy the house and would now have to remortgage it to pay for the legal bills...she would have to live around the poverty line for the next three years.

In *Martin v. Martin* (2007), 2007 CarswellOnt 683 (Ont. S.C.J.) the parties separated after an eight year marriage with two children. During the marriage the wife funded the husband's computer training, did book-keeping for the husband's business, and paid the husband's debts. The husband was largely absent from the home and did little to maintain the home or care for the children. During the marriage he spent his money on alcohol and drugs. The wife's application for an unequal division of net family property was granted and the husband received only half of the equalization payment due to him, the Court concluding that the wife bore and met and inordinate portion of the joint responsibilities of the spouses through her earnings, housework and child care. As well, the wife continued to do so after separation, because the husband had paid very little child support since separation despite his current employment.

Note: Tort Awards for Spousal Misconduct

In some cases where spousal misconduct amounts to a tort, courts have chosen to award tort damages rather than allowing the misconduct to justify an unequal division of property. *Valenti v. Valenti* (1996), 21 R.F.L. (4th) 246 (Ont. Gen. Div.), discussed earlier in volume I, involved a sixteen year marriage in which a violent, alcoholic husband worked sporadically, while the wife provided the main financial support. The trial judge dismissed the wife's claim for an unequal division of property, finding that the circumstances were not "unconscionable." However, she awarded the wife $15,000 damages for the assault by the husband. Should a husband who kills his wife be entitled to an equalization of net family property under Part I of the FLA? See *Maljkovich v. Maljkovich* (1995), 20 R.F.L. (4th) 222 (Ont. Gen. Div.); appeal to the Ontario C.A. dismissed ([1997] O.J. No. 4338); leave to appeal to S.C.C. dismissed April 30, 1998.

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and *Giba v. Giba*, 1996 CarswellOnt 2948 (Ont. Gen. Div.) (alcoholic husband who had rarely worked during the relationship and who had damaged the matrimonial home and assaulted his wife and son was denied any share of the NFP).

(v) Post-Separation Conduct and Anticipated Future Needs

Courts have taken different approaches to the question of whether post-separation events or needs should be considered in an application under s. 5(6) of the *Family Law Act*. In *Kelly v. Kelly*, an early decision under the FLA (set out above in the section on the continued relevance of constructive trust), the court was unwilling to use s. 5(6) to deal with post-separation events, in that case, a decrease in property values. Subsequent judicial decisions have slowly eroded the initial judicial position that post-separation events could not be considered under s. 5(6). The first development was a series of cases allowing for consideration of post-separation misconduct. These cases will be examined here. The second development, reflected by the recent decision of the Ontario Court of Appeal in *Serra v. Serra*, 2009 ONCA 105, 61 R.F.L. (6th), has been to allow market-driven changes in the value of property post-separation to be taken into account under s. 5(6). That second development will be dealt with in the next section, below.

In *Merklinger v. Merklinger* (1992), 43 R.F.L. (3d) 109 (Ont. Gen. Div.), aff'd. (1996), 26 R.F.L. (4th) 7 (Ont. C.A.), the court considered a spouse's improper, post-separation financial dealings under a s. 5(6) application. The parties were married in 1972 and separated in 1990. Shortly before the parties' separation, under the threat of bankruptcy, the husband persuaded the wife to place a further mortgage on the matrimonial home, which was registered in her name, so that he could service one of his investments. Following the sale of the home, a net equity of $120,000 remained after the payment of massive encumbrances that had been used to finance the husband's business ventures. A Muskoka cottage, purchased in 1988, was also registered in the wife's name. At the date of the parties' separation, it was worth $1,100,000. After the separation the wife wanted the cottage sold, but the husband wanted it for himself. The husband allowed the mortgage to go into default, stopped paying the municipal taxes, and would not cooperate in the selling of the property. The bank moved to realize on its security. The husband arranged to purchase the cottage from the bank for $650,000 when the debt was $800,000 and the property was valued at $1,000,000. The bank released the husband from liability for his share of the debt and settled its claim with the wife for $25,000. The transaction was carried out through a company incorporated by the husband so that it would appear that he had no interest in the transaction. In addition, following separation, the husband sold assets contrary to a preservation order. The husband provided no support for the wife or the child of the marriage who lived with her. The wife applied under s. 5(6) to distribute the net family property unequally in her favour and to have the husband held in contempt.

Jennings J. held for the wife, awarding her an amount that was more than half the difference between the net family properties by declining to order any equalization payment. He also found the husband's conduct in violating the court order to preserve property to be in contempt of court. Jennings J. stated that the circumstances surrounding the encumbrancing of the wife's interest in the matrimonial property shortly before separation could be construed as conduct leading to an unconscionable result if s. 5(1) was to be applied. Moreover, the husband's conduct post-separation and during the litigation made it "simply ludicrous to suggest that he now receive an equalization payment from his wife:"

> What the husband has done here, post-separation, is to decline to make financial provision for his wife and one of his three children, and to scheme at defeating the wife's right to what must have been some reasonably significant equity existing at valuation day in the summer property. Surely that conduct must break the bargain implicit in s. 5(7) and defeat his entitlement to equalization.

The Ontario Court of Appeal (Osborne, Labrosse and Weiler JJ.A.) affirmed the decision in very brief reasons:

> The trial judge awarded an unequal division of net family property in favour of the wife. He recognized that the standard of unconscionability which is required to make an award under s. 5(6) is a high one. In light of the economic effect of the husband's conduct on the wife, particularly with reference to the cottage, we agree with the trial judge's conclusion that to require the wife to pay any amount by way of equalization payment would be unconscionable within the meaning of s. 5(6) of the *Family Law Act, 1986*.

In *Tamitegama v. Tamitegama*, (1993) unreported, Ontario Gen. Div., a wife who improperly dissipated $150,000 in family funds after separation, leaving her husband liable for a $125,000 trust company loan, was denied a matrimonial property equalization award under s.5(6) of the FLA. As in *Merklinger*, the guilty spouse flouted an asset preservation order. In finding that it would be "unconscionable" to award an equalization payment to the wife, Eberle J. distinguished the case from previous rulings which had found that only pre-separation events may be considered in making an unequal property division under s. 5(6):

> This case is different; here the events that I have considered are the product of deliberate acts by one of the parties....I am satisfied that the appropriate focus of the FLA on the "V" day evaluation of property does not prevent the consideration of such events after valuation day.

Berend Hovius, "Unequal Sharing of Net Family Properties under Ontario's *Family Law Act*"
(2009) 27 *Canadian Family Law Quarterly* 147 at 190-192

(v) — Abdication of Responsibilities & Other Conduct after Valuation Date

Initially, the issue of whether events after the valuation date could be considered in the application of s. 5(6) of the FLA sharply divided the courts. The Ontario Court of Appeal apparently settled the matter in *Merklinger v. Merklinger*, concluding that a court could take into account the economic consequences of a spouse's post-separation conduct. In that case, the husband's conduct caused the wife to lose her cottage after separation and he then purchased it at a discount from the bank. In addition, he failed to support his wife and a dependent child after the separation. At trial, Justice Ferrier found that it would be "outrageous" and, therefore, unconscionable if the wife had to pay any equalization sum. The Court of Appeal upheld the decision, simply noting: "In light of the economic effect of the husband's conduct on the wife, particularly in reference to the cottage, we agree with the trial judge's conclusion. ..."

After the *Merklinger* decision, more judges began to hold that abdication of familial responsibilities after separation, particularly failure to provide financial support, can result in an adjustment of the equalization sum.[180] This approach received approval in *Scherer v. Scherer* where the Ontario Court of Appeal upheld a refusal to extend a limitation period so as to allow a husband to apply for equalization of NFPs.[181] Justice Charron, in explaining why the husband had no *prima facie* grounds for a sharing of NFPs, stated: "When the respective contributions of the parties, financial and otherwise, are considered for the years following the separation, the

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[180] See, e.g., *Macedo v. Macedo*, [(1996), 19 R.F.L. (4th) 65, 1996 CarswellOnt 391 (Ont. Gen. Div.)] (a decision that just pre-dated the *Merklinger* case); *Barrett v. Barrett* (2002), 26 R.F.L. (5th) 237, 2002 CarswellOnt 671 (Ont. S.C.J.); and *Ahern v. Ahern*, [(2007), 2007 CarswellOnt 5733 (Ont. S.C.J.)].
[181] (2002), 26 R.F.L. (5th) 183, 2002 CarswellOnt 1203 (Ont. C.A.).

v. Clausi case by suggesting that it was the circumstances surrounding how the parties managed their financial affairs in that case rather than the amount of the equalization sum that caused equalization of NFPs to be unconscionable. Although Justice McDermot refused to vary the equalization sum in *Lo v. Lo*, he did decline to order the husband to pay pre-judgment interest on it, largely because of the decline in the value of his pension.

Notes and Questions

1. For comments on *Serra* see Berend Hovius, "Market Driven Changes in Property Values after the Valuation Date under Ontario's Family Law Act: The Story Continues" (2009) 28 *Can. Fam. L. Q.* 105 and Stephen Grant and Andrew Freeman, "Case Comment on *Serra v. Serra*" (2009), 61 R.F.L. (6th) 39.

2. Do you think that *Serra* will lead to fewer claims for constructive trusts and reverse constructive trusts in the context of equalization claims under the FLA?

3. In its 1993 *Report on Family Property Law*, the Ontario Law Reform Commission recommended that Part I of the *Family Law Act* should be amended to grant courts the discretion to vary an equalization payment to recognize a substantial post-valuation date change in value of an asset if necessary to ensure an equitable result, having regard to the cause of the fluctuation. Note that the recommendation involved the enactment of a separate provision to deal with post-valuation date changes in the value of an asset and that the threshold for departure from equalization would be "inequity" rather "unconscionability". When Prince Edward Island enacted family property legislation generally modeled on Ontario's, it adopted the OLRC's recommendation. See s. 6(6) of the *Family Law Act*, S.P.E.I. 1995, c. 12. Would amendment of the FLA along these lines be preferable to result achieved by *Serra*? The OLRC's reasoning on this issue is reproduced below.

Ontario Law Reform Commission, *Report on Family Property Law* (1993)

(d) Options for Reform

(iii) Add Fluctuation in Value as a Factor to be Considered in Section 5(6)

A modest reform would be the addition of fluctuation in value as a relevant indicator of unconscionability. This would alleviate the current situation in which a non-owning spouse loses the benefit of post-valuation date increases in value which reflect her contribution during the relationship. It would also alleviate the problem of extracting an equalization payment from a title-holding spouse regarding an asset that has collapsed in value between the valuation date and trial. Including fluctuation in value as a factor to which courts may have regard when determining unconscionability will have the advantage of removing the incentive for spouses to seek a remedial constructive trust in such circumstances. Rather, courts will consider the merits of sharing the benefit or burden of a fluctuation in value of an asset directly, without demanding that the applicant make out the requirements of unjust enrichment and establish the suitability of a proprietary remedy.

Including fluctuation in value as a consideration under section 5(6) is a more flexible method of recognizing the issue than providing for the alteration of the valuation date. The subsection should provide expressly for courts to consider responsibility for the cause of a change in value. Allowing courts to consider these factors may increase the length and complexity of litigation.

There is uncertainty as to the limits of the court's power to authorize the disposition of property pursuant to these sections. The few cases reported to date have not resolved this uncertainty. In *Sullivan* (1986), 2 R.F.L. (3d) 251 (Ont. D.C.), the court held that section 21(1)(c) empowered it to authorize a transaction disposing of or encumbering a matrimonial home even when the property is jointly owned by the spouses. However, *Re Henry and Cymbalisty* (1986), 55 O.R. (2d) 51 (U.F.C.), it was held that this section was only directed at protecting the personal right to possession provided by section 19. Accordingly, it cannot be utilized to defeat a spouse's property rights, such as those enjoyed by joint tenant. It is submitted that the latter interpretation seems to be more consistent with the scheme of Part II....

Note: Debora v. Debora

A matrimonial home is defined in s. 18 (1) of the FLA as a property in which a person has an *interest* and that is, or if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence. In *Debora v. Debora* (2006), 33 R.F.L. (6th) 252 (Ont. C.A.) the court expanded the definition of "interest" to include a corporately-owned property. On the facts of the case, the husband's holding company was the registered owner of a million dollar cottage that was used by the family during the marriage. (The parties had been living together for some time, but were not married, when the property was purchased.) The husband provided all of the funding for the acquisition of the cottage. All of the on-going expenses and renovations were paid for personally and not by the corporation. The husband was the sole-shareholder and the only director of the corporation. The court pierced the corporate veil, holding that the corporation was merely his alter-ego. Because the cottage was found to be a matrimonial home, the husband was not able to deduct its pre-marital value in the calculation of his NFP under Part I of the FLA.

MacFarland v. MacFarland

2009 CarswellOnt 2949 (Ont. S.C.J.)

J. MACKINNON J.:

Introduction

[1] The parties were married on October 1, 1983 and separated on May 10, 2006. They have two children; Kerri, who was 18 years old at the time the trial commenced, and Nathan, who was just turning 14 then. Kerri resides with her father. Nathan resides with his mother. At the time of trial, Ms. MacFarland was 47 years old and Mr. MacFarland was 49 years old.

[2] These few facts had been agreed upon. In addition, neither party sought to change the children's residential arrangements. A Statement of Admitted Facts filed in the Trial Record also includes some agreed upon values for some of the Respondent's assets and debts on the date of separation. I have incorporated these into the Net Family Property Statement that is included in these reasons.

[3] In addition, the parties agreed at trial that the Applicant could retain the matrimonial home and the Respondent could retain the cottage, subject to the proper "balance to adjust" being paid in light of the court's determinations. The Respondent also agreed that the Applicant could retain the Ford Explorer, but its value was disputed.

[4] The trial proceeded on these issues:

- The Applicant's claim that the cottage registered in the Respondent's name was a

circumstances of the communication is critical. See *Kutlesa v. Kutlesa*, 52 R.F.L. (6th) 164 (Ont. S.C.J.) and she relies on Justice Pazaratz's decision in *Kutlesa* to the effect that:

> The "violence" referred to in section 24(3)(f) must, of necessity, contemplate that spouses may need to be protected from serious injury and harm which can arise even without physical hitting. Intimidation and emotional abuse can take many forms. The court has a responsibility to address the real dynamics between the parties, including any effort by a strong or dominant partner to engage in psychological warfare, or coerce without making disclosure.

Justice McGee goes on to say:

> There can be no doubt that the vitriolic communications constitute "violence" as intended within Section 24(3)(f) of the *Family Law Act*. They are threatening, intimidating and were intended to be taken seriously. They occurred over the course of a full week, and were not provoked in any manner proportionate to the response given. Much of the father's texts were not even responded to by the mother. A reasonable person could not view the father's texts as either jestful or ambivalent.
>
> The texts were forwarded in the period immediately preceding the return of the mother's motion. The attack her counsel. They cannot be excused as a harmless excess of personality. The September 28 to October 5th texts resolve some of the prior conflict in evidence and provide a rich context for the parties' relationship dynamic.

Justice McGee found that the text messages were sufficient to support a finding of violence, and that even if she was wrong on this, went on to find that it was no longer in the child's best interests for her parents to continue to reside together. She noted that the best interests of the child are paramount in determining an order for exclusive possession. .....

The husband was given 24 days to vacate the home. I do not doubt that Justice McGee got this one right. Obviously there are many forms of violence and the text messages in this particular case crossed the line. It is a reminder that in this age of social media, judges are increasingly aided in their exploration of the facts by the production of emails, text messages, Facebook messages, video taken by iPhones and the like. There is no doubt that the wife would not have been able to bring forward this motion without being able to produce the actual text messages. Violence can take many ugly forms and it is not wise, when there are clear signals about potential violence, to wait to see if something goes wrong. Exclusive possession is a very heavy handed response by a court and usually enrages the person dispossessed of their property. Justice McGee is well aware that exclusive possession is a remedy of last resort, but also recognizes that the messages transmitted by the husband, in this case, cross a red line.

Note: Exclusive Possession and Issues of Violence

The use of applications for exclusive possession to avoid spousal and other family violence is not uncommon. The tragic context in which these issues may sometimes arise is well-illustrated by this letter to the Attorney-General of Ontario from staff members at a battered woman's shelter:

Dear Mr. Hampton,

We are representatives of shelters for battered women and their children in the Ottawa area and are writing to you to express our concern over a recent tragedy.

The case in question is that of Pamella Behrendt. On March 5th, 1990 Pamella Behrendt, through her solicitor, brought a Motion against her husband, Stefan Behrendt, seeking exclusive possession of the matrimonial home. On March 6th, 1990, Judge Louise Charron of the Ottawa District Court denied the Motion. On Monday June 11th, 1990, in the matrimonial home, Stefan Behrendt murdered his wife with a chainsaw then took his own life with a hunting knife. Three children survive them.

This case is a tragedy. With the benefit of hindsight one can assume that had exclusive possession been ordered on March 6th, the tragedy might have been avoided. However, we are not writing to lay blame at anyone's feet. There are no guarantees that the murder would not have been carried out and we assume that the affidavit evidence before Her Honour Judge Charron was not any more remarkable than in other similar cases.

Nonetheless, several concerns arise about the case and we feel that there is no appropriate forum to have these concerns addressed. We are therefore writing to you in the hopes that you can provide us with some guidance.

The facts of the case were not largely in dispute. Mr. Behrendt had been on psychiatric disability leave from Carleton University for some six years. His behaviour described in Mrs. Behrendt's Affidavit was "objectively speaking" anti-social. He wore only pyjamas and refused to clean himself. He kept himself locked in a bedroom and only came out to obtain food when the rest of the family had gone to bed. He had not contributed to household expenses for some time. There was one reported incident of physical violence with one daughter but also a fair amount of evidence of the psychological impact his behaviour was having on both of his daughters and his wife. The twenty year old son, who had not been living in the home for one and a half years, filed an affidavit in support of his father stating that the level of violence and tension suggested by Mrs. Behrendt was exaggerated.

Her Honour Judge Charron considered the affidavit evidence and denied the Motion for the following reasons:

> "Undoubtedly it has become very difficult for the parties to live under the same roof. Nevertheless, the material presented on the motion does not, in my view, warrant granting exclusive possession of the matrimonial home to the applicant. The Court should only exercise its power to make such an Order with great care. The nature of the allegations, the contradictory view presented by one of the children and the age of the children living in the home all militate against the granting of such an order. The motion is dismissed. In all the circumstances, each party should bear his or her own costs."

We have several concerns with the assumptions underlying Judge Charron's decision to deny the Motion.

First, she is not at all clear as to what she means by "the nature of the allegations". Presumably because there was little overt violence reported, the allegations were not viewed as being seriously disruptive. This assumption is contrary to the bulk of medical and psychological evidence available that such behaviour would indeed have real negative impact on the security interests of the other family members.

Second, Judge Charron places weight on the contradictory view of one child, i.e., the child that was not living in the home for the past one and a half years. (He was attending university in Waterloo.) We did not think that judges could place any weight on evidence of persons who have not been in a position to observe anything first hand.

Third, she takes into account "the ages of the children living at home", i.e., a seventeen year old girl and an eighteen year old girl. Again, the judge does not explain what significance this had for her but we can only assume that she feels that teenage children are not entitled to live in an environment that is free from violence, including psychological violence. We would note that both girls were in the midst of writing exams at the time of the application.

We feel that these same assumptions are held by other members of the judiciary and are woven throughout the decisions that on a daily basis, deny families access to violence free homes. Such assumptions are not justified and in fact are dangerous.

Clearly the judge felt that the situation was "very difficult" but that the balance of convenience lay in favour of keeping the seething negativity under one roof, rather than removing the source of the tension until such time as the home could be sold and the proceeds divided. Why does the potential harm (here fatal) weigh so little in comparison to the inconvenience of having one party move out of the house temporarily? From where does this assumption come? Is this policy implicit in the legislation or is it a judicial creation? If the judge was concerned about the contradictory evidence why didn't she adjourn the matter and order the parties to conduct cross-examination on the affidavits?

With respect to the lawyers involved, why didn't Mrs. Behrendt's lawyer include affidavits from the two daughters? Did Mrs. Behrendt forbid the daughters to become involved (as is alleged in her affidavit) or did her lawyer discourage her from obtaining their affidavits because judges are known to have great disdain for lawyers who involve the children? Was the lawyer concerned that she would invite a negative reaction from the judge for including affidavits from the children in the material? Should lawyers have to worry about judges dealing with their clients on a punitive basis?

We outline our concerns, but not because we think that anything can be done about the Behrendt tragedy. We write because the legal system failed that family and the assumptions that underly that failure continue to occur every day in court rooms throughout this province.

The legal system must begin to listen to and believe women when they have the courage to speak out and ask for help. Conservative statistics on wife assault indicate that one in eight women are emotionally and physically abused in the home. This awareness must be incorporated into all judgements made by the legal system. We hope that Mrs. Behrendt's case is not forgotten. We hope that it is raised as an example in law school courses and in courses designed to educate the judiciary. We hope that your policy analysts and your legislative drafters are aware of this case when considering amendments to the *Family Law Act.*

To the extent that orders for exclusive possession are a protective measure in cases of domestic violence, two groups are excluded from this protection. The first is unmarried couples: the definition of spouse in part II of the FLA is the same as that in Part I, which deals with family property, and is confined to married persons. The second, is aboriginal persons living on reserves. These exclusions are discussed in more detail below.

NOTE: RESTRAINING ORDERS

In cases involving harassment and violence, the FLA offers another remedy, in addition to orders for exclusive possession of the matrimonial home. Section 46 of the FLA provides for restraining orders—orders restraining the other spouse from molesting, annoying or harassing the applicant. The Act gives police the power to enforce restraining orders. While only married spouses may apply for orders for exclusive possession, unmarried spouses, and even cohabitants whose relationships do not satisfy the extended definition of spouse, may apply for a restraining order.

The 2009 amendments to the FLA involved some changes to strengthen s. 46 and enhance its ability to ensure the safety of women and children and the addition of s. 47.1:

> **46.** (1) **Restraining order** — On application, the court may make an interim or final restraining order against a person described in subsection (2) if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody.
>
> (2) **Same** — A restraining order under subsection (1) may be made against,
>
> (a) a spouse or former spouse of the applicant; or
>
> (b) a person other than a spouse or former spouse of the applicant, if the person is cohabiting with the applicant or has cohabited with the applicant for any period of time.
>
> (3) **Provisions of order** — A restraining order made under subsection (1) shall be in the form prescribed by the rules of court and may contain one or more of the following provisions, as the court considers appropriate:
>
> 1. Restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating with the applicant or any child in the applicant's lawful custody.
>
> 2. Restraining the respondent from coming within a specified distance of one or more locations.
>
> 3. Specifying one or more exceptions to the provisions described in paragraphs 1 and 2.
>
> 4. Any other provision that the court considers appropriate.

(4) **Transition** — This section, as it read immediately before the day section 35 of the *Family Statute Law Amendment Act, 2009* came into force, continues to apply to,

(a) any prosecution or other proceeding begun under this section before that day; and

(b) any order made under this section that was in force immediately before that day.

47.1 Order regarding conduct — In making any order under this Part, other than an order under section 46, the court may also make an interim order prohibiting, in whole or in part, a party from directly or indirectly contacting or communicating with another party, if the court determines that the order is necessary to ensure that an application under this Part is dealt with justly.

Note that as a result of the new amendments all cohabitants are covered, not only those whose relationship satisfies the statutory definition of spouse. As well, courts are given the power to make interim orders prohibiting contact or communication when they are making any other orders under Part III (i.e. support orders).

Justice Geraldine Waldman, "The What and the Why of the Proposed Integrated Domestic Violence Court"

22 (2) *Matrimonial Affairs*, November 2010

Domestic violence or partner abuse is well recognized as a serious and complex issue. The response of the justice system, both family and criminal, is complicated by the fact that domestic violence often gives rise to myriad inter-related family problems involving safety and family separation. Legal proceedings are further complicated by the fact that the criminal and family cases occur separately. The two courts operate as independent silos with virtually no sharing of information between them and very little ability to communicate. This is particularly true in Toronto where the criminal and family courts are housed in separate buildings with a separate judiciary and little crossover by lawyers. The courts must rely on the litigants to provide necessary information. The family court judge has no independent means of obtaining a copy of a bail or probation order to ensure that the terms of a custody or access order does not conflict with the bail or probation terms. Family and child protection cases are often delayed by the progress of the criminal justice system. Families are in some cases precluded from attending counseling because of no contact terms in bail and probation orders. In some cases, litigants are reluctant to address certain important issues in the family case because of the potential impact on their testimony at the criminal trial.

In other words, the system in its current form is not providing families with a coherent and comprehensive response to their problems when family and domestic violence issues coincide.

To address these concerns, we are working towards opening an Integrated Domestic Violence Court in Toronto in the spring of 2011. It will bring a more coherent and holistic approach to families involved in both the criminal and family justice systems where the underlying issue is domestic violence. The goal of the court is to promote justice and protect the rights of all litigants, and through its holistic and comprehensive approach to resolution, increase offender accountability and promote victim safety.

The court is modeled on similar courts operating in several states in the United States including New York, Vermont and Idaho. The court is based on a one-family-one-judge concept. Simply put, both the criminal and family case will be dealt with in one court before a single judge. While one judge will case manage both the family and criminal cases, each will be dealt with separately. The cases are not combined but they do appear before the single judge in sequence. The appropriate law, standard of proof, rules of procedure and rules of evidence will apply in each case as they would in any court. All Crown policies will apply to the case as in any domestic violence court. Generally, both cases will be dealt with on the same day, sequentially. The judge will proceed through the process to plea and sentence in the criminal case and through

the issues which are a consequence of domestic violence, it can focus its resources and develop specific expertise.

Research and evaluation are an important part of this pilot project. The project has obtained funding and has a research component already in place.

Eligibility for the Court:

In order to participate in the project, litigants must be involved in concurrent criminal and family litigation with domestic violence as the underlying issue. Any domestic family litigation within the jurisdiction of the Ontario Court of Justice is eligible. Criminal proceedings where the Crown is proceeding by way of summary conviction are eligible. Participation in the court will be voluntary. Both litigants must agree to have the cases transferred to the IDV Court and the Crown must agree that the case is appropriate.

Next Steps:

The Planning Committee has worked together to create a model for the court that incorporates the goals of the court, builds on the American experience and adapts the court to the Ontario justice system and culture. We will be meeting with community groups over the next months to explain the project and to address concerns or comments as we work towards the opening of the court in the spring of 2011.

Ontario has a history of developing innovative courts designed to respond to specific issues including the drug court and mental health court. We see this court as part of this new justice model and we are excited about its development.

Justice Waldman sits in the Ontario Court of Justice at 47 Sheppard Avenue East in Toronto. Both Justice Waldman and Justice Bovard are very committed to this court because of their experience with cases involving domestic violence while presiding in both criminal court and family court. They, along with the Community Advisory Committee, are committed to finding ways to improve what we do for families where domestic violence is the underlying issue.

D. Groups Excluded from Protection Under Part II of the FLA

Part II of the *Family Law Act* awards spouses possessory rights to the matrimonial home and provides certain protection for those rights. The general definition of "spouse" in section 1(1) determines who is covered by Part II by defining a spouse as "either of a man or woman who (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting the right under this Act". Thus, persons who cohabit without going through a marriage ceremony are not "spouses" under Part II. Section 24(3) of the *Family Law Act* directs a court to consider six factors in determining whether an exclusive possession order should be made, including "any violence committed by a spouse against the other spouse or children". Insofar as s. 24(3) is viewed as a remedy upon marriage breakdown for threats or incidents of violence in a relationship, persons living in common law relationships characterized by violence are accorded less protection under the Act. They may request restraining orders under s. 46 of the *FLA*, but not orders for exclusive possession of the matrimonial home. As was discussed above in the note on legislative reform in respect of the property rights of unmarried couples (at the end of the materials on constructive trust) some provinces and territories have extended property rights, including possessory rights in the matrimonial home, to unmarried couples.

Aboriginal peoples living on First Nations reserves are also left unprotected by the Act. As a result of the Supreme Court of Canada's ruling in *Derrickson v. Derrickson* (discussed in the materials dealing with matrimonial property and the FLA) provincial family law which regulates ownership or possession of land is not applicable to lands on First Nations reserves. Thus in *Paul v. Paul,* [1986] I S.C.R. 306, decided at the same time as *Derrickson,* a wife's claim for an order for interim occupancy of the home the couple had built on reserve land was dismissed. The wife in *Paul* was abused by her husband. She wanted to stay in her home on the reserve with her children and sought protection from her spouse. The Supreme Court followed its decision in *Derrickson* which held that the *Indian Act* provides a comprehensive legislative enactment with respect to the right to possession of lands on a First Nations reserve. The Court in *Paul* did not consider that the *Indian Act* does not regulate property division and access to the home in violent situations or during marriage breakdown. Indeed, the Court failed to acknowledge the violent conflict at the base of the dispute between the parties.

Mary Ellen Turpel ("Home/Land" (1991) l0 *Can. J. Fam. L.* 17) states:

> [T]he situation aboriginal women are left with after *Derrickson* and *Paul*, especially *Paul*, is one in which no law protects them. Given the magnitude of the problem of family violence in aboriginal communities, this is barbaric. The failure of the court to explicitly recognize the violence in the *Paul* case reveals a callous and wilful blindness. Recent empirical studies have suggested that the incidence of physical family violence perpetrated against aboriginal women is approximately 70% or seven times the national average. In a study, released in l990 by the Ontario Native Women's Association, of the situation for aboriginal women in Ontario, 91% of respondents indicated that family violence occurs in their communities; 71% indicated they had personally experienced it.
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> As a consequence of *Derrickson* and *Paul,* aboriginal women who are abused will have to seek shelter off the reserve, usually in...non-aboriginal run shelters for battered women, frequently at considerable distances away from the reserve. More likely, an aboriginal woman's economic situation would prohibit a move to a shelter and she may simply be trapped in an abusive situation with dim hopes for improvement. In situations where the marriage breaks down, the inability of a spouse (most frequently woman) to gain access to the matrimonial home is an aggreviously unjust one. An order for compensation is no redress. Indian reserves do not have cash economies and compensation awards would be nominal, if even enforceable. Moreover, where compensation was awarded in lieu of division, the task of obtaining another house on the reserve is a cumbersome endeavour. Housing lists on all Indian reserves are heavily backlogged and women will be forced to live in the already crowded homes of relatives, or more likely off the reserve, until housing can be obtained.

In *Wynn v. Wynn* (1989), 14 A.C.W.S. (3d) 107 (Ont. Dist. Ct.), the court found a way to avoid the harshness of the ruling in *Paul.* The spouses were both Indians as defined by the *Indian* Act. The wife sought interim exclusive possession of the matrimonial home, which was situated on a First Nations reserve. Wright D.C.J., acknowledging that the court could not grant an order for exclusive possession of a matrimonial home that is located on a First Nations reserves, instead made an "*in personam*" order, without reference to the property, restraining the husband from interfering with the wife's possession of the matrimonial home.

As was discussed in the previous chapter of these materials, Bill S-2, called *Family Homes on Reserves and Matrimonial Interests or Rights Act* received royal assent on June 19, 2013. The legislation puts in place provisional federal rules regarding matrimonial real property on reserves and also creates a mechanism for First Nation communities to enact their own matrimonial real property laws. The law has not yet been proclaimed in force and the federal government has indicated that there will be a 12 month transitional period to allow first nations communities to enact their own laws.

The default federal provisional rules provide for joint possessory rights in the matrimonial home while spouses (both married and common law) are living together and impose controls on disposition and encumbrance of interests in the home during the relationship without the consent of the other spouse. Orders may be granted excluding one spouse from the home in cases of family violence and after the relationship has broken down to meet the interests of children who reside in the home.